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THE LABOR INJUNCTION

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THE
LABOR INJUNCTION

BY

FELIX FRANKFURTER

AND

NATHAN GREENE

New York
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To

MR. JUSTICE BRANDEIS

FOR WHOM LAW IS NOT A SYSTEM OF ARTIFICIAL
REASON, BUT THE APPLICATION OF ETHICAL
IDEALS, WITH FREEDOM
AT THE CORE.

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F. F.
N. G.

Harvard Law School,
September, 1929.

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THE LABOR INJUNCTION

THE LABOR INJUNCTION

CHAPTER I

THE ALLOWABLE AREA OF ECONOMIC CONFLICT

On May 27, 1895, the Supreme Court of the United States for the first time in its history passed on the scope and validity of an injunction in a labor controversy. Yet the very next year this modern application of an ancient procedure was made a party issue, and since then has maintained itself at the forefront of American political problems. "Government by injunction" was the slogan by which the Democratic platform of 1896 inveighed against the practice of issuing labor injunctions. After 1908, the Republican Party also proposed the correction of abuses due to judicial intervention in labor conflicts. In response to this agitation, important federal legislation was enacted in 1914. But the hopes in which it was conceived soon foundered. Protest revived and grew. And so, in the campaign of 1928 both parties acknowledged the existence of abuses and committed themselves to the need of further legislation. What is true of the nation is true of the states. In 1896, the Chief Justice of Massachusetts remarked that the "practice of issuing injunctions in cases of this kind is of very recent origin." [1] Since then the practice has grown widely, giving rise to vigorous counter-agitation. State legislatures have followed Congress in corrective legislation, but proposals for curbing resort to labor injunctions continue to be urged by Democratic and Republican governors alike.

Here, as elsewhere in the law, a full understanding of the history of a legal institution under scrutiny is necessary to wise reform. How labor injunctions came to be and how they operate in practice, the uses which they serve and the abuses to which they have given rise, must be known if we are to determine whether the labor injunction in action represents a desirable social policy.

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[1] Field, C. J., in Vegelahn *v.* Guntner, 167 Mass. 92, 100 (1896).

Early Substantive Law

Two conceptions which, prior to modern legislation, dominated the attitude of English law towards collective action by labor—the doctrines of conspiracy and of restraint of trade [2]—worked themselves permanently into American law. The earliest American case declared with untroubled simplicity that "A combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both." [3] While this idea appears in later cases, it was short-lived. When joint action by laborers was attacked for the first time in New York,[4] the prosecution dipped into the precedents of a bygone age—*R.* v. *Journeymen-Taylors of Cambridge;* [5] *R.* v. *Eccles;* [6] the specious *Tubwomen's Case* [7]—and drew therefrom their familiar wisdom, then supported also by the authority of Hawkins' Pleas of the Crown: [8] "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it." "Conspiracy is the gist of the charge; and even to do a thing which is *lawful* in itself, by *conspiracy*, is *unlawful*."[9] But early we find the court charging the jury in terms which foreshadowed the later standard definition of conspiracy: "He observed there were two points of view in which the offence of a conspiracy might be considered; the one where there existed a combination to do an act, unlawful in itself, to the prejudice of other persons; the other where the act done, or the object of it, was not unlawful, but *unlawful means* were used to accomplish it."[10] During the next three decades there followed a series of indictments and convictions for criminal conspiracy;[11] but nearly all of them presented elements of coercion and intimidating practices.[12]

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[2] Winfield, History of Conspiracy and Abuse of Legal Procedure (1921); Wright, Law of Criminal Conspiracies and Agreements (1873); Erle, Law Relating to Trade Unions (1869); Dicey, The Relation Between Law and Public Opinion in England (1914) Appendix 467, Note 1; Sayre, *Criminal Conspiracy* (1922) 35 Harv. L. Rev. 393; Webb, History of Trade Unionism (1920) 597-99; Henderson, Trade Unions and the Law (1927). See Hornby *v.* Close, L. R. 2 Q. B. 153 (1867), concerning which Frederic Harrison, a member of the Royal Commission of 1867, said: "the judgment lays down . . . [that] Unionism becomes (if not according to the suggestion of the learned judge—criminal) at any rate something . . . condemned and suppressed by the law." Beehive of Jan. 26, 1867, quoted in Webb *supra* at 262. See Mason, Organized Labor and the Law (1925) especially c. I-V.

[3] Philadelphia Cordwainers Case (1806) 3 Commons and Gilmore, Documentary History of American Industrial Society (1910) 59, 233. But see Twenty-four Journeymen Tailors, Commonwealth *v.* Moore, *et al.* (1827), 4 *ibid.* 99, 249-53, which refused to follow Recorder Levy's charge in the Philadelphia Cordwainers Case.

[4] People *v.* Melvin, Select Cases 111 (N. Y., 1810); 3 Commons and Gilmore, *op. cit.* 251.

[5] 8 Modern 10 (K. B. 1721).

[6] 1 Leach C. C. 274 (K. B. 1783).

[7] Cited in 8 Modern 10 (1721), but its authority is doubted. See Purrington, *The Tubwomen* v. *The Brewers of London* (1903) 3 Col. L. Rev. 447.

[8] 1 Hawkins, The Pleas of the Crown (5th ed.), c. 72, p. 190, where the learned author says "there can be no Doubt, but that all Confederacies whatsoever, wrongfully to prejudice a third Person, are highly criminal at Common Law . . ."

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[9] People v. Melvin, Select Cases, 111, 219 (N. Y., 1810). Mr. Sampson, attorney for the defendants, thus animadverted upon the reference to English antiquities: "When is it, that in search of a rule for our conduct, we shall no longer be bandied from *Coke* to *Croke*, from *Plowden* to the Year Books, from thence to the dome books, from *ignotum* to *ignotius*, in the inverse ratio of philosophy and reason . . ." at 155.

[10] People *v.* Melvin, Select Cases, 111, 275 (N. Y., 1810). The court expressly withheld decision on the question "whether an agreement not to work, except for certain wages, would amount to this offence, [conspiracy] without any unlawful means taken to enforce it." A condensed report of the case may be found in 2 Wheeler Cr. Cas. 262 (N. Y., 1810).

[11] 1809—Baltimore Cordwainers, Maryland *v.* Powley, 3 COMMONS AND GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1910) 249;
1815—Pittsburg Cordwainers, Commonwealth *v.* Morrow, 4 *ibid.* 15, 27, 81-83;
1821—Commonwealth *v.* Carlisle, Brightly 36 (Pa.);
1823—New York Hatters' Case, GROAT, INTRODUCTION TO THE STUDY OF ORGANIZED LABOR (1916) 138;
1824—Buffalo Tailors, 4 COMMONS AND GILMORE, *op. cit.* 93, discussed in WRIGHT, LAW OF CRIMINAL CONSPIRACIES (1873) 93;
1827—Twenty-four Journeymen Tailors, Commonwealth *v.* Moore, *et al.*, 4 COMMONS AND GILMORE, *op. cit.* 99, 247, 261-63;
1829—Baltimore Weavers, 4 *ibid.* 269;
1835—People *v.* Fisher, 14 Wend. 9 (N. Y.);
1836—Twenty Journeymen Tailors, N. Y., People *v.* Faulkner, 4 COMMONS AND GILMORE, *op. cit.* 315.
1836—Hudson Shoemakers, N. Y., People *v.* Cooper, 4 *ibid.* 277;
1836—Philadelphia Plasterers, Commonwealth *v.* Grinder, 4 *ibid.* 335; and see Witte, *Early American Labor Cases* (1926) 35 YALE L. J. at 820.

[12] Witte, *op. cit.* (1926) 35 YALE L. J. 825.

In 1840 came the clarifying opinion of the great Chief Justice Shaw of Massachusetts in *Commonwealth* v. *Hunt*.[13] In this case the indictment averred that the defendant and others formed themselves into a society and agreed not to work for any person who employed a non-member of this society. The trial court ruled that such a combination constituted a conspiracy. Conviction followed, only to be set aside on appeal. This reversal by the Supreme Judicial Court of Massachusetts is noteworthy because it permanently arrested the tendency to identify a labor organization as such with a criminal conspiracy, but not less so because Shaw's opinion brought together the isolated materials of earlier cases and gave them formulation and direction.[14] When Shaw said, after a study of the purpose of the organization in the *Hunt Case*, "Such a purpose is not unlawful," [15] he indicated purpose or motive as one vital consideration. When he said "The legality of such an association will therefore depend upon the means to be used for its accomplishment," [16] he pierced to the second fighting issue. *Commonwealth* v. *Hunt* did not altogether stop prosecutions for criminal conspiracy against trade unions because they were trade unions.[17] Some states tried to achieve the result of the *Hunt Case* by legislation, but with dubious success.[18] Moreover, "conspiracy" and "restraint of trade," as will soon appear, survived as convenient grab-bag terms for illegal group activities.[19] But, on the whole, since *Commonwealth* v. *Hunt*, American legal history is a steady accumulation of instances where the line has been drawn between purposes and acts permitted, and purposes and acts forbidden. The "end" of labor activities and the "means" by which they are pursued constitute the chief inquiries of labor law.

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[13] 4 Met. 111 (Mass. 1842).

[14] An earlier indication of the same trend is Commonwealth *v.* Carlisle, Brightly 36 (Pa. 1821).

[15] 4 Met. 111, 129 (Mass. 1842).

[16] *Ibid.* 134.

[17] See cases collected by Witte, *op. cit.* (1926) 35 YALE L. J. 825.

[18] Ill. L. 1873, 76; Maryland L., 1884, c. 266; N. J. Acts 1883, c. 28; N. Y. L., 1870, c. 19; N. Y. Penal Code, 1881, § 170; N. Y. L., 1882, c. 384; Pa. L., Act 1242, 1869; Pa. L., Act 1105, 1872; Pa. L., Act 33, 1876; Pa. L., Act 230, 1891.

In New York, judicial construction at first defeated the intent of this legislation, People *v.* Fisher, 14 Wend. 9 (N. Y., 1835), but the case was subsequently repudiated. Master Stevedores' Association *v.* Walsh, 2 Daly 1 (N. Y., 1867). For attempts by the Congress of the United States to modify the doctrine of conspiracy, see 52d Cong., 1st Sess., H. R. 6640; 56th Cong., 1st Sess., H. R. 11667; 57th Cong., 1st Sess., S. 649. See Chapter IV, *passim.*

[19] *E.g.,* Harvey *v.* Chapman, 226 Mass. 191, 195 (1917).

Federal Courts and Labor Controversies

"American law" is a geographical expression. Not only are there forty-eight ultimate tribunals for determining the law of their respective states; there is also a hierarchy of federal courts, sitting in the various states, whose authority in some cases is concurrent with, and in others exclusive of, the jurisdiction of the state courts. Such apparent heterogeneity need not alarm the systematizer. The problems usually are of general scope, and the conceivable solutions are certainly less than the half-hundred. If we survey the material from two of our important industrial states—New York and Massachusetts—we shall have a fair reflex of the law of the other states; and the doctrines prevailing in the federal courts furnish the one body of law which, however limited in scope, is nation-wide in application. That is to be our method.[20]

An indispensable preliminary to understanding is an appreciation of the bases of the jurisdiction of the federal courts. These are drawing unto themselves labor controversies with increasing measure, and their rulings, though not binding, exert weighty influence upon state courts. The source of judicial power of the United States courts is found in Article III of the Constitution, which provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party; to Controversies between . . . citizens of different States. . . ."[21] Thus, grist for the federal courts consists of two types of litigation—first, cases depending on the nature of the controversy, *i.e.*, those that arise under federal law; and secondly, cases in which the parties to a controversy are citizens of different states.

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[20] The United States Department of Labor, in a review of strikes and lockouts for the year 1927, reported that fifty percent of all labor disputes occurred in New York, Massachusetts and Pennsylvania and that those three states, together with California, Connecticut, Illinois, New Jersey, Ohio and Rhode Island, accounted for seventy-five percent of all labor troubles. See *U. S. Daily*, July 16, 1928, p. 1.

[21] Art. III, § 2, cl. 1.

In litigation growing out of labor controversies several statutes have been invoked in the federal courts. The law regulating the Government's interest in protecting the United States mails [22] was a ground of decision in the *Debs Case,* but has been practically quiescent in this connection ever since.[23]

The Interstate Commerce Act,[24] regulating interstate transportation, is much more important. Judge (now Mr. Chief Justice) Taft wrote the pioneer opinion [25] basing federal relief in a labor dispute upon it. He granted a decree restraining the chief executives of the Brotherhood of Locomotive Engineers from issuing, and rescinding if already issued, any order requiring the employees of defendant railways to refuse to handle and deliver freight cars in course of transportation from one state to another when hauled over the complainant's road, where a strike was in progress. Relying on the duty of a carrier under the Interstate Commerce Act to accept freight of a connecting carrier,[26] Judge Taft held that inducement of its breach involved not alone a criminal liability: "If a person, with rights secured by a contract, may, in case of loss, recover damages from one not a party to the contract, who, with intent to injure him, induces a breach of it, a fortiori can one whose rights are secured by statute recover damages from a person who, with intent to injure him, procures the violation of those rights by another, and causes loss." [27] The apparent import is that no interference with interstate commerce is ever justifiable. Of the subsequent cases implying this assumption, two contained ingredients of violence.[28] The one that involved an incitement to breach of contract definitely rebutted such an inference: "Their purpose being lawful—that is to say, to secure increased wages and better conditions of service—the concert of action is per se lawful and proper, and, in the absence of proof of a purpose to accomplish their object by unlawful means, the usual presumption should rather be indulged that they would not resort to unlawful means to accomplish it." [29] Considerable stimulus was given by the *Debs Case* to the utilization of the Interstate Commerce Act as a vehicle for federal jurisdiction over labor controversies, in that the Supreme Court, despite the lower court's dependence on the Sherman Law,[30] partly relied on the Interstate Commerce Act: "The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control." [31]

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[22] U. S. Criminal Code, § 201 (35 STAT. 1127, 1909): "Whoever shall knowingly and willfully obstruct or retard the passage of the mail . . . shall be fined . . . or imprisoned . . . or both."

[23] But see United States *v.* Railway Employees' Dept. A. F. L., 283 Fed. 479 (N. D. Ill., 1922), granting a temporary injunction; defendants' motion to dissolve overruled, 286 Fed. 228 (N. D. Ill., 1923); injunctions made permanent 290 Fed. 978 (N. D. Ill., 1923). See CHAFEE, THE INQUIRING MIND (1928) 198, for a criticism of the exercise of this jurisdiction, especially in the coal strike of 1919.

[24] Act of Feb. 4, 1887, 24 STAT. 379, as amended and greatly amplified by a series of enactments of which the most important is the Transportation Act of 1920 (41 STAT. 456). The various Acts, as published by the Government Printing Office, comprise a pamphlet of over three hundred pages.

[25] Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 730 (N. D. Ohio, 1893). See another phase of this litigation, 54 Fed. 746 (N. D. Ohio, 1893).

[26] 24 STAT. 379 § 3 (2) (1887).

[27] 54 Fed. 730, 740 (N. D. Ohio, 1893).

But, in the meantime, the lower federal courts were laying the foundation for the application of another statute that was destined to pre-empt the field of federal intervention in labor conflicts. Passed primarily as a safeguard against the social and economic consequences of massed capital,[32] the Sherman Law provided broadly that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." [33] Now a "conspiracy" had at this time been defined by the Supreme Court substantially in the language of Lord Denman,[34] ". . . a combination of two or more persons by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. . . ." [35] The first interpretation [36] of the Sherman Law came from the lower courts. In 1893 one of the district courts held that "They [Congress] made the interdiction include combinations of labor, as well as of capital." [37] Succeeding decisions with but a single excep-

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[28] Knudsen *v.* Benn, 123 Fed. 636 (D. Minn., 1903); United States *v.* Workingmen's Amalgamated Council, 54 Fed. 994 (E. D. La., 1893).

[29] Wabash R. Co. *v.* Hannahan, 121 Fed. 563, 575 (E. D. Mo., 1903). But *cf.* Mr. Justice Sutherland in Bedford Co. *v.* Stone Cutters' Ass'n, 274 U. S. 37, 47 (1927): "A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."

[30] United States *v.* Debs, 64 Fed. 724 (N. D. Ill., 1894). The Supreme Court said: "We enter into no examination of the act of July 2, 1890, c. 647, 26 STAT. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction". *In re* Debs, Petitioner, 158 U. S. 564, 600 (1895). This statute is the Sherman Law, next to be considered.

[31] *In re* Debs, Petitioner, 158 U. S. 564, 586 (1895).

The war and post-war experience made clearer the need of adequate machinery for the continuous adjustment of the industrial relations upon American railroads, whereby strikes and the consequent dislocations would be avoided, rather than dealt with after the event by dubious resort to the courts. See Title III of the Transportation Act, 1920 (41 STAT. 456, 469), establishing the Railroad Labor Board, and the operation of this Board, as disclosed by Penna. R. R. *v.* Labor Board, 261 U. S. 72 (1923), and Penna. Federation *v.* P. R. R. Co., 267 U. S.

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203 (1925). Title III was repealed by the Railway Labor Act, 1926 (44 STAT. pt. 2, 577), which established the scheme now in force for adjusting disputes between carriers and their employees.

The Interstate Commerce Act has continued to serve as a basis for federal jurisdiction in these cases: Kinlock Telephone Co. *v.* Local Union No. 2, 265 Fed. 312 (E. D. Mo., 1920); Illinois Cent. R. Co. *v.* International Ass'n of Machinists, 190 Fed. 910 (E. D. Ill., 1911).

[32] See 2 SHERMAN, RECOLLECTIONS OF FORTY YEARS (1895), 1072-73; and see remarks in 21 Cong. Rec. 2461, 2569 (1890).

[33] Act of July 2, 1890, c. 647, § 1, 26 STAT. 209.

[34] See Jones' Case, 4 B. & Ad. 345, 349 (1832).

[35] Pettibone *v.* United States, 148 U. S. 197, 203 (1892). And see Duplex Co. *v.* Deering, 254 U. S. 443, 465 (1921).

[36] It was doubtless the intention of Congress to pass to the courts the burden of clarifying language purposely left obscure. Senator Edmunds, of the Judiciary Committee, was frank to say: "We all felt . . . that we should make its definition out of terms that were well known to the law already, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise". 21 Cong. Rec. 3148 (1890). Also see 2 HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS (1903), 264 *et seq.*

[37] United States *v.* Workingmen's Amalgamated Council, 54 Fed. 994, 996 (E. D. La., 1893); *aff'd* Workingmen's Amalgamated Council *v.* United States, 57 Fed. 85 (C. C. A. 5th, 1893). The Attorney General of the United States thus commented upon the significance of this litigation: "It should, perhaps, be added, in this connection—as strikingly illustrating the perversion of a law from the real purpose of its authors—that in one case the combination of laborers known as a 'strike' was held to be within the prohibition of the statute, and that in another, rule 12 of the Brotherhood of Locomotive Engineers, was declared to be

tion[38] accumulated to the same effect.[39] This view ultimately received the Supreme Court's sanction.[40] The most definite exposition of the Sherman Law was made in the *Gompers Case:*[41] "It [the Sherman Law] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or . . . of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter."[42]

An attempt by Congress to narrow the federal jurisdiction as thus expounded by the Supreme Court led to the Clayton Act of 1914.[43] The special reliance for curbing what were deemed to have been exuberances in judicial interpretations of the Sher-

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in violation thereof. In the former case, in answer to the suggestion that the debates in Congress showed the statute had its origin in the evils of massed capital, the judge, while admitting the truth of the suggestion, said: 'The subject had so broadened in the minds of the legislators that the source of this evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who enter into it.'" REPORT OF THE ATTORNEY GENERAL, 1893, p. xxvii-xxviii.

[38] United States *v.* Patterson, 55 Fed. 605 (D. Mass., 1893). Exhaustive and valuable briefs of counsel are reprinted with the report of the case. The court's language was prophetic ". . . if the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states . . . by strikes or boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute," at 641.

[39] Waterhouse *v.* Comer, 55 Fed. 149 (W. D. Ga., 1893); United States *v.* Elliott, 62 Fed. 801 (E. D. Mo., 1894), demurrer to the bill overruled, 64 Fed. 27 (E. D. Mo., 1894); Thomas *v.* Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803, 821 (S. D. Ohio, 1894).

[40] Loewe *v.* Lawlor, 208 U. S. 274 (1908).

[41] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 (1911).

[42] *Ibid.* 438. Injunction suits based upon violation of the Sherman Law were, however, not numerous, for before the Clayton Act in 1914 such injunctions were granted only on behalf of the United States, and after 1913 appropriations for the enforcement of this Act carried a provision that the money was not to be used to prosecute suits against labor groups. See Chapter IV, pp. 140-141.

[43] 38 STAT. 730.

man Law was section 6 of the Clayton Act: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws should be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." The judicial story which followed the enactment of this statute will have its place in our legislative history of the labor injunction.

The effect of the legislation just summarized is to render all union or collective activity, if it affects trade among the states,[44] subject to federal jurisdiction, that is, to present "federal questions" for litigation in the federal courts apart from the citizenship of the parties.[45]

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[44] Whether particular combative devices or tactics used by a labor organization affect interstate commerce is but part of a larger, and here irrelevant, problem of American constitutional law, namely, the demarcation of the respective fields of state and national authority. Whether such devices or tactics are to be condemned entirely or in part by a federal court having jurisdiction to decide the question is alone our immediate concern. Thus, in the following cases the major problem was whether the business or industry that was being interfered with constituted a part of interstate commerce and so came within federal competency. United Mine Workers *v.* Coronado Co., 259 U. S. 344 (1922); the same litigation at a later stage, 268 U. S. 295 (1925); United Leather Workers, *etc. v.* Herkert, *etc.,* 265 U. S. 457 (1924), *rev'g* United Leather W. I. U. V. *v.* Herkert & Meisel Trunk Co., 284 Fed. 446 (C. C. A. 8th, 1922), see (1924) 34 YALE L. J. 206; Industrial Association *et al. v.* United States, 268 U. S. 64 (1925). *Cf.* International Organization, *etc. v.* Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927). And in the following cases the question was: granting that the particular device, *e.g.,* "the secondary boycott", as used in the particular case, did affect the flow of interstate commerce to some extent, did it affect the flow sufficiently to be "an unlawful interference with interstate commerce" and, therefore, of federal cognizance: Aeolian Co. *v.* Fischer, 27 F. (2d) 560 (S. D. N. Y., 1928), especially affirming opinion of Judge Swan in 29 F. (2d) 679 (C. C. A., 2nd, 1928); Bedford Cut Stone Co. *v.* Journeymen Stone Cutters' Ass'n, 274 U. S. 37 (1927). See also Chapter IV *passim.* The majority and dissenting opinions (especially the latter) of the Circuit Court of Appeals for the Second Circuit in the Aeolian Co. Case indicate how a determination as to the existence of federal jurisdiction may include a determination upon the merits, *i.e.,* once granted that the commerce interfered with is *interstate* commerce, no conduct resulting in such interference may be thought justifiable. See Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1924) 34 YALE L. J. 685, 718 *et seq.*

The second great head of federal jurisdiction rests upon diversity of citizenship between the opposing parties, rather than upon the fact that the controversy involves federal law.[46] As a consequence, the cases coming to the federal courts through this channel may raise any question of law that could be suggested in a state court. To forestall conflicts inevitable between two sets of courts, independent of each other and yet of co-ordinate power, administering justice in a single state, section 34 of the First Judiciary Act of 1789 provided that the body of "laws" of the state wherein a United States court sits shall provide the rules for decision in trials at common law in that court of the United States. This provision has been retained in every revision of the federal judicature acts since that date.[47]

But the argument was made more than half a century after its enactment, and successfully, that the word "laws" in this section did not include the common law decisions of state courts.[48] For decisions, said Mr. Justice Story, "are, at most, only evidence of what the laws are; and are not of themselves laws."[49] And so the Supreme Court held "that the true interpretation of the thirty-fourth section limited its application . . . to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles . . . to real estate, and other matters immovable . . . and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[50]

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[45] Jurisdiction has also been taken to enjoin a violation of the Lever Act: Kroger Grocery & B. Co. *v.* Retail Clerks' I. P. Ass'n, 250 Fed. 890 (E. D. Mo., 1918) later held invalid in United States *v.* Cohen Grocery Co., 255 U. S. 81 (1920); see note in 5 CORN. L. Q. 184; Chafee, *The Progress of the Law, 1919-1920, Equitable Relief Against Torts* (1921), 34 HARV. L. REV. 388, 402. So, federal jurisdiction has been assumed because the suit was brought by a receiver, McGibbony *v.* Lancaster, 286 Fed. 129 (C. C. A. 5th, 1923); Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 60 Fed. 803 (E. D. Wis., 1894); Thomas *v.* Cincinnati, N. O. & T. P. Ry Co., 62 Fed. 803 (S. D. Ohio, 1894), or because the complainant was manufacturing munitions for the government and was acting under the authority of the laws of the United States, Wagner Electric Mfg. Co. *v.* District Lodge No. 9, I. A. of M., 252 Fed. 597 (E. D. Mo., 1918).

[46] "The chief and only reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens". Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 83. See Friendly, *Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483.

[47] REV. STAT. § 721 (1878); Comp. STAT. 581 (1901); 28 U. S. C. § 725 (1926), reads: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply".

[48] That the contrary had been assumed previously seems established. See Warren, *op. cit.* (1923) 37 HARV. L. REV. 49, 84.

This doctrine has had a very luxuriant unfolding. Federal courts have carried their independence of the local law as interpreted by the highest court of the state, much beyond the confines of "commercial jurisprudence."[51] The doctrine

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[49] Swift *v.* Tyson, 16 Pet. 1, 18 (U. S. 1842).

[50] 16 Pet. at 18-19. This case has evoked a great deal of discussion. GRAY, NATURE AND SOURCES OF THE LAW (1921) 248-56; BEALE, CONFLICT OF LAWS (1916) § 112 a; Schofield, *Swift* v. *Tyson* (1910) 4 ILL. L. REV. 533, reprinted in 1 SCHOFIELD, CONSTITUTIONAL LAW AND EQUITY (1921) 38. PEPPER, THE BORDER LAND OF FEDERAL AND STATE DECISIONS (1889); Heiskell, *Conflict between Federal and State Decisions* (1882) 16 AM. L. REV. 743, 747. See B. & O. Railroad *v.* Baugh, 149 U. S. 368 (1893), especially the dissenting opinion of Mr. Justice Field. Mr. Charles Warren's scholarship has disclosed that the pertinent part of section 34 as originally drafted, read as follows: "'. . . the Statute law of the several States . . . and their unwritten or common law . . . shall be regarded as rules of decision in . . . the courts of the United States. . . .'" Warren, *op. cit.* (1923) 37 HARV. L. REV. 85-88. Mr. Justice Holmes recently said of this discovery by Mr. Warren: "An examination of the original document by a most competent hand has shown that Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant." B. & W. Taxi. Co. *v.* B. & Y. Taxi. Co., 276 U. S. 518, 535 (1928).

[51] "The doctrine of *Swift* v. *Tyson* has not only been maintained by the Supreme Court, but it has been extended, though with many vacillations, from 'general commercial Law', through 'rules of Common Law', and 'general Law', to 'general Jurisprudence'". GRAY, NATURE AND SOURCES OF THE LAW (1921) 251.

The last affirmation of the doctrine in B. & W. Taxi. Co. *v.* B. & Y. Taxi. Co., 276 U. S. 518, 530 (1928), was as follows: "The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment." This case is discussed in (1928) 38 YALE L. J. 88; (1928) 76 U. OF PA. L. REV. 105. Mr. Justice Holmes, in a dissenting opinion (in which concurred Brandeis and Stone, JJ.) again presented his "convictions", stated by him in the earlier case of Kuhn *v.* Fairmont Coal Co., 215 U. S., 349 (1910). He said, in part: "If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of *Swift* v. *Tyson* is as freely employed in the field of torts as in that of contracts. The Supreme Court has disregarded rulings by the state courts concerning the validity of agreements limiting liability for negligence;[52] the rights and obligations of master and servant; doctrines as to assumption of risk, contributory negligence, and injuries by fellow-servants.[53] Still, it is vital to discriminate that while United States courts follow their own understanding of the common law, "the law to be applied is none the less the law of the State; and may be changed by its Legislature, except so far as restrained by the Constitution of the State or by the Constitution or laws of the United States." [54] The availability in many instances of two sets of doctrines in the same state, applied by two different tribunals, will explain why litigants, where diversity of citizenship exists, invoke the United States rather than the state courts. If doctrines of substantive law in the federal courts are more favorable to a plaintiff seeking to enjoin offensive trade union activity or the injunctive relief is more ample, plaintiffs possessed of the proper jurisdictional qualifications will of course go to the federal courts. The eagerness of employers to be heard by a federal court is clearly revealed by the devices to which they resort in order to present an alignment of

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of the duty of all Courts to bow, whatever their private opinions might be. . . . I see no reason why it should have less effect when it speaks by its other voice." 276 U. S. at 534. And see Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 524 *et seq.*

[52] Railroad Company *v.* Lockwood, 17 Wall. 357 (U. S. 1873). See Chicago, Milwaukee &c. Railway *v.* Solan, 169 U. S. 133 (1898).

[53] Hough *v.* Railway Co., 100 U. S. 213, 226 (1879); B. & O. Railroad *v.* Baugh, 149 U. S. 368 (1893); Gardner *v.* Michigan Central Railroad, 150 U. S. 349 (1893); Northern Pacific Railroad *v.* Hambly, 154 U. S. 349 (1894); Beutler *v.* Grand Trunk Railway, 224 U. S. 85 (1912). See Hudson, *The Turntable Cases in the Federal Courts* (1923) 36 HARV. L. REV. 826. But see Bucher *v.* Cheshire Railroad Co., 125 U. S. 555, 584-85 (1888): "The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that . . . they nevertheless determine the law of Massachusetts on that subject".

[54] Chicago, Milwaukee &c. Railway *v.* Solan, 169 U. S. 133, 136 (1898), *per* Gray, J. The language of a dissenting opinion in B. & O. Railroad *v.* Baugh, 149 U. S. 368, 403 (1893) *per* Field, J. may be here quoted: "Nothing can be more disturbing and irritating to the States than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented and which has no existence except in the brain of the Federal judges in their conceptions of what the law of the States should be on the subjects considered".

parties that meets the requisite diversity of citizenship. In cases where the employer and the striking employees are citizens of the same state, the test of diversity [55] has been satisfied by aligning the employer as a party-defendant with the strikers and bringing the suit in the name of some citizen of another state who has a contract with the employer, performance of which is allegedly being imperilled by the strike,[56] or who in some other way asserts a special interest in the subject matter of the strike.[57] Obviously, the employer thus aligned as a party defendant is in no sense averse to the plaintiff's prayer for relief; he is not only not contesting the complaint but is most desirous that the relief be granted. The courts are indifferent to this collusion for obtaining the benefit of the law as applied by the federal courts.[58]

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[55] The rule is that diversity must be complete, *i.e.*, all of the indispensable parties on one side must be citizens of states different from all of the indispensable parties on the other side of the controversy, though it is not necessary that all on the same side be citizens of the same state. See DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE (1928), § 67.

[56] Chesapeake & O. G. A. Co. *v.* Fire Creek Coal & Coke Co., 119 Fed. 942 (S. D. W. Va., 1902), *aff'd* 124 Fed. 305 (C. C. A. 4th, 1903); Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1919), *aff'd* 274 Fed. 57 (C. C. A. 6th, 1921). And see Vonnegut Machinery Co. *v.* Toledo Machine & Tool Co., 263 Fed. 192 (N. D. Ohio, 1920), which was reversed in 274 Fed. 66 (C. C. A. 6th, 1921) on the ground that the identity of interest between the plaintiff and the employer-defendant required alignment of both of them as plaintiffs. To the same effect are Davis *v.* Henry, 266 Fed. 261 (C. C. A. 6th, 1920); Niles-Bement Co. *v.* Iron Moulders Union, 254 U. S. 77 (1920).

[57] In Fortney *v.* Carter, 203 Fed. 454 (C. C. A. 4th, 1913), bondholders were allowed to sue on the ground that the strike tended to impair the mortgage security. And see, too, *Ex parte* Haggerty, 124 Fed. 441 (N. D. W. Va. 1902). In Niles-Bement Co. *v.* Iron Moulders Union, 254 U. S. 77 (1920), *aff'g* 258 Fed. 408 (C. C. A. 6th, 1918), which reversed 246 Fed. 851, the Supreme Court held that where a defendant corporation was subject to the control of the plaintiff through majority stock ownership and through identity of some officers and directors, such defendant corporation had no interest in conflict with the plaintiffs and must be aligned as a plaintiff in determining whether the District Court had jurisdiction through diverse citizenship. The court said: "Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute . . . there was not, and could not be any substantial controversy, any 'collision of interest', between the petitioner and the Tool Company. . . ." (at 81) In this appeal to the Supreme Court, so anxious were the employers to stay in the federal courts that they for the first time in the course of that litigation raised the federal question that interstate commerce was being interfered with. The Supreme Court abruptly dismissed the contention, saying: "The allegations . . . are much too casual and meager to give serious color to the claim now made that the cause of action asserted is one arising under the laws of the United States. The contention is an afterthought and plainly was not in the mind of the writer of the bill of complaint." (at 82) *Cf.* Stephens *v.* Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio 1917) where the telephone subscribers were permitted to sue for an injunction to restrain strike activities against the telephone company.

Thus it is that the federal courts, under the Supreme Court's lead, have dealt with labor controversies apart from the authority of federal legislation and untrammelled by state decisions.[59] Two very influential cases came to the Supreme Court through diversity of citizenship. In one case, the right to picket was challenged.[60] This case came from Illinois, but neither in the intermediate Circuit Court of Appeals [61] nor in the Supreme Court was special attention given to Illinois law. The Supreme Court's conclusion was independently arrived at—Illinois authorities being dealt with as part of a large group of cases from other state and federal courts. The other case brought up the thorny issues raised by the inducement of employees to quit work.[62] The case arose in West Virginia, but in none of the numerous opinions written in the lower federal courts [63] did the leading West Virginia case [64] receive careful consideration. In the Supreme Court the state case was cited, but the limitations put upon it by the state court were unheeded. The independence of federal courts from state court rulings is strikingly illustrated by a decision of a federal court in California.[65] Interference with a complainant's business, by means of circularization of an "unfair list" containing his name, had been held illegal by the United States courts of California, in 1905 [66] and 1907.[67] Later, the Supreme Court of California, in 1908,[68] and again in 1909,[69] sustained the legality of such union activity. When the same question subsequently again came before a federal court in

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[58] For example, in the Dail-Overland Case (274 Fed. 56) the Circuit Court of Appeals in examining the circumstances said: "As to collusion: While there are circumstances from which it might be surmised, they are not such as to establish it . . ." and referred in a footnote to the following: "For example: The original bill of complaint and the answer . . . are indorsed by the same solicitors; the respective answers and cross-bills of the Overland Company and the Overland Inc. are verified by the same person as vice president of each corporation, and also indorsed by the same solicitors; and the bill and both answers and cross-bills were filed in rapid succession, the bill on June 5th, the Overland Company's pleading on June 10th, and that of the Overland Inc. on June 11th." (at 63.) Another instance is provided in Stephens *v.* Ohio State Telephone Co., 240 Fed. 759, 765 (N. D. Ohio, 1917) where the court spoke as follows: "There is no evidence of collusion between the parties in this case; that the original parties may be friendly antagonists is not, however, improbable. Counsel's surmise may be correct, but something more than that is necessary to make their 'collusion' reprehensible. The court will not concern itself with the fact, if it exists, that the parties to the cause have agreed to submit their alleged controversy to this court; if there is nothing in substance to support the theory of collusion, other than that, the fact is of no consequence."

[59] Indeed, in the labor cases where *equitable* relief is sought, an additional ground for the inapplicability of § 34 has been suggested, *viz.,* that § 34 provides for conformity to state laws by federal courts only "in trials at *common law*". Loewe *v.* California State Federation of Labor, 189 Fed. 714, 715 (N. D. Cal. 1911). For an estimate of the volume of labor cases that come to the federal courts through diversity jurisdiction see Chapter V, p. 210. This is the subject of an unpublished thesis (in the Harvard Law School Library) by D. L. Bugg and John Verdon, *The Abolition of Federal Jurisdiction Based Solely on Diversity of Citizenship in Labor Injunction Cases.*

[60] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184 (1921).

[61] Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1917).

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[62] Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229 (1917).

[63] Motion to modify temporary injunction denied, Hitchman Coal & Coke Co. *v.* Mitchell, 172 Fed. 963 (N. D. W. Va., 1909); appeal therefrom dismissed Lewis *v.* Hitchman Coal & Coke Co., 176 Fed. 549 (C. C. A. 4th, 1910); final decree Hitchman Coal & Coke Co. *v.* Mitchell, 202 Fed. 512 (N. D. W. Va., 1912); *rev'd* by Circuit Court of Appeals, Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed. 685 (C. C. A. 4th, 1914).

[64] Thacker Coal Co. *v.* Burke, 59 W. Va. 253 (1906). This case came up on a demurrer to a bill that alleged defendants were "wilfully, wrongfully and maliciously persuading, inducing, enticing and procuring said servants of the plaintiff . . . to . . . depart from the plaintiff's service. . . ." at 258. The Court, in supporting this count, said, "We do not deny the principle that a man may do an act damaging another, even maliciously, when he has legal excuse or justification therefor. . . . But in the present case the declaration avers that the defendants had no justification . . . we are governed, on demurrer, by the declaration. Therefore, we hold that the first count of the declaration states a cause of action." at 259-60. In a later decision the Supreme Court recognized the narrow limits of this West Virginia decision. In Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 210 (1921) Taft, C. J., said: "The effect of cases cited as authority must be determined by an examination of the pleadings and facts to see how the malice or lack of lawful excuse was established. . . . Thus . . . *Thacker Coal Co.* v. *Burke*, 59 W. Va. 253. . . . The element of malice was supplied by averment of the complaint, and was, of course, admitted by the demurrer."

[65] Loewe *v.* California State Federation of Labor, 189 Fed. 714 (N. D. Cal., 1911).

[66] Loewe *v.* California State Federation of Labor, 139 Fed. 71 (N. D. Cal., 1905); Seattle Brewing & Malting Co. *v.* Hansen, 144 Fed. 1011 (N. D. Cal., 1905).

[67] Sailors' Union of the Pacific *v.* Hammond Lumber Co., 156 Fed. 450 (C. C. A. 9th, 1907).

[68] Parkinson Co. *v.* Bldg. Trades Council, 154 Cal. 581 (1908).

[69] Pierce *v.* Stablemen's Union, 156 Cal. 70 (1909).

California, it thus freed itself from the state law: ". . . the federal courts are not . . . excepting so far as affected by local statutes, administering the laws of the state in which they sit, but are administering the law as applicable to all the states. And in applying the general principles of equity . . . they determine for themselves what those principles are, untrammeled by differing decisions of the state tribunals." [70]

This brings us to the actual rulings in labor cases by state and federal tribunals, and the modes of approach which lie behind them.

Early Use of the Injunction

Eloquent testimony to the efficacy of the injunction has been borne by the man who was largely the occasion for its prominence. Explaining the collapse of the famous Pullman strike, Eugene V. Debs testified that "the ranks were broken, and the strike was broken up . . . not by the Army, and not by any other power, but simply and solely by the action of the United States Courts in restraining us from discharging our duties as officers and representatives of the employees. . . ." [71]

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[70] Loewe *v.* California State Federation of Labor, 189 Fed. 714, 715 (N. D Cal., 1911). But *cf.* the approach of the late Judge Hough in two cases: Gill Engraving Co. *v.* Doerr, 214 Fed. 111 (S. D. N. Y., 1914) and Duplex Printing Press Co. *v.* Deering, 252 Fed. 722, 745 (C. C. A. 2nd, 1918), and of Judge Thacher in the recent case, Aeolian Co. *v.* Fischer, 27 F. (2d) 560 (S. D. N. Y., 1928), *aff'd* by Circuit Court of Appeals for 2d Circuit, 29 F. (2d) 679 (1928).

[71] See United States Strike Commission, Report on the Chicago Strike of June-July, 1894, 143-44 (1895). See also United States *v.* Debs, 64 Fed. 724, 759 (N. D. Ill., 1894) giving the testimony of Mr. Debs on the 20th of August, 1894, before the Commission appointed by the President. A recent analysis of the American laborer's attitude towards the injunction is found in Frey, The Labor Injunction: An Exposition of Government by Judicial Conscience and Its Menace (1922), reviewed by Zechariah Chafee, Jr. in (1923) 36 Harv. L. Rev. 503. Some evidence as to the efficacy of the injunction generally is given in Chapter III and in Appendix VIII. A vivid description of the effect of the Hitchman injunction upon further efforts to unionize mines in West Virginia is given in Lane, Civil War in West Virginia (1921).

Some, at least, of the authorities, did not share Debs' view as to the efficacy of the injunction against him. The following telegram was received from the Marshal, with the accompanying endorsement of Judge Grosscup and the United States Attorneys, Messrs. Walker and Milchrist: "Chicago, Ill., *July 3, 1894.* Hon. Richard Olney, *Attorney-General, Washington, D. C.:* When the injunction was granted yesterday a mob of from 2,000 to 3,000 held possession of a point in the city near the crossing of the Rock Island by other roads, where they had already ditched a mail

The *Debs Case* is now a half-forgotten story [72] that bears retelling. A dispute between the Pullman Company and its employees, due to an undercurrent of dissatisfaction with the Company's paternalistic measures, was fanned into a strike in May, 1894, by the announcement of a twenty per cent. reduction in wages. The American Railway Union, with whom the Pullman employees were associated, decided, under Debs' leadership, to help the strike by forbidding its members to operate trains that included cars manufactured by the Pullman Company. The paralysis of transportation resulting from the consummation of a strike on June 27, 1894, at Chicago, the country's great railroad centre, swiftly spread to the west and south. Within two days it became *the* national problem. President Cleveland ordered the United States Marshal at Chicago to place special deputies upon all interstate trains—"action ought to be prompt and vigorous." On July 2 the extraordinary step was taken: the Attorney General of the United States directed the United States Attorney in Chicago to apply to the United States Court for a writ of injunction restraining "the said defendants, E. V. Debs, G. W. Howard, L. W. Rogers, Sylvester Keliher . . . and all persons combining and conspiring with them, and all other

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train, and prevented the passing of any trains, whether mail or otherwise. I read the injunction writ to this mob and commanded them to disperse. The reading of the writ met with no response, except jeers and hoots. Shortly after, the mob threw a number of baggage cars across the track, since when no mail trains have been able to move.

I am unable to disperse the mob, clear the tracks, or arrest the men who were engaged in the acts named, and believe that no force less than the regular troops of the United States can procure the passage of the mail trains, or enforce the orders of the court. I believe people engaged in trades are quitting employment to-day, and in my opinion will be joining the mob to-night, and especially to-morrow, and it is my judgment that the troops should be here at the earliest moment. An emergency has arisen for their presence in this city. J. W. Arnold, *United States Marshal.*

We have read the foregoing, and from that information and other information that has come to us believe that an emergency exists for the immediate presence of the United States troops. P. S. Grosscup, *Judge.* Edwin Walker, Thomas E. Milchrist. *Attorneys.*" REPORT OF THE ATTORNEY GENERAL, 1894, p. xxxiii.

[72] Dunbar, *Government by Injunction* (1897) 13 L. Q. REV. 347, 352; CLEVELAND, THE GOVERNMENT IN THE CHICAGO STRIKE OF 1894 (1913); 2 MCELROY, GROVER CLEVELAND (1923) 138; JAMES, RICHARD OLNEY AND HIS PUBLIC SERVICE (1923) 36 *et seq.;* ALTGELD OF ILLINOIS (1924) 116; 2 MORISON, THE OXFORD HISTORY OF THE UNITED STATES (1927) 400-2.

persons whomsoever absolutely to desist . . . from . . . in any manner interfering with the business of any of the following named railroads. . . ."[73] The enjoined conduct was further elaborated, if not defined, to the extent of more than eight hundred words. Mr. Cleveland's biographer has shrewdly observed that "To ask Mr. Debs and his fellow leaders to bow to so drastic an injunction at a moment when blood was hot, and when victory seemed to them assured, was a stern test of their sweet reasonableness."[74] It was too stern. Before many days, Debs and his colleagues were charged with contempt of the United States Court in that "the service of the injunction did not affect or change the policy or conduct of the defendants relative to said strikes, but that, on the contrary, the defendants continued . . . to direct the employés of the railway companies . . . to leave . . . in a body. . . ."[75] On December 14, 1894, Debs was sentenced to imprisonment for six months, the court basing its authority to issue the contemned injunction upon the Sherman Anti-trust Law of 1890.[76] An appeal to the Supreme Court of the United States resulted in an affirmance,[77] on the broad grounds that the Government might appeal to its civil courts for aid,[78] and "that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority."[79]

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[73] For the Debs Injunction, see Record on Appeal of 158 U. S. 564 and Appendiv IV.

[74] 2 McElroy, Grover Cleveland (1923) 149.

[75] United States *v.* Debs, 64 Fed. 724, 728 (N. D. Ill., 1894). The substance of the information filed against Debs is reprinted *ibid.* 726-30.

[76] "An act to protect trade and commerce against unlawful restraints and monopolies". 26 Stat. 209 (1890). Thomas *v.* Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (S. D. Ohio, 1894); United States *v.* Workingmen's Amalgamated Council, 54 Fed. 994 (E. D. La., 1893). But see United States *v.* Patterson, 55 Fed. 605 (D. Mass. 1893) and later discussion of the Sherman Law.

[77] *In re* Debs, Petitioner, 158 U. S. 564 (1895).

[78] For an English treatment of this doctrine, see Moore, Acts of States in English Law (1906) 30. *Cf.* Reed *v.* County Com'rs, 21 F. (2d) 144 (E. D. Pa. 1927) *aff'd* 21 F. (2d) 1018 (C. C. A. 3d, 1927), *aff'd* (on other grounds) 277 U. S. 376 (1928).

[79] *In re* Debs, Petitioner, 158 U. S. 564, 599 (1895). The popular response to this decision is told in 2 Warren, The Supreme Court in United States History (1926) 702-5. See Patterson, *Judicial Usurpation of Power* (1905) 10 Va. L. Reg. 855. Wright, Battles of Labor (1906) 122. The Democratic national platform for the presidential campaign of 1896 read as follows: "We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Consti-

"The indubitable authority" of "ancient times" was derived from cases involving equitable jurisdiction over nuisances.[80] "Nuisance" is not a very happy or adequate concept from which to evolve law for regulating the clash of conduct in modern industrial relations. And yet, the injunction in the *Debs Case* was not a new invention; it had precursors, the best known, strangely enough in view of the evolution of English law, being the decision of an English Chancery Court, *Springhead Spinning Co.* v. *Riley*.[81] The case turned upon a demurrer to a bill brought against a managing committee of an employee association who, in the course of a strike against lowering of wages, published placards of an allegedly intimidating character. The prayer, that "Defendants . . . be restrained from printing or publishing any placards . . . whereby the property of the Plaintiffs, or their business, might be damnified . . ." was granted by Malins V.-C. solely on the ground that "the bill states, and the demurrers admit, acts amounting to the destruction of property. Upon the general question whether this Court can interfere to prevent . . . workmen issuing placards amounting to intimidation . . . if it should turn out that this Court has jurisdiction . . . I can only say that it will be one of the most beneficial jurisdictions that this Court ever exercised." [82]

While the doctrine of the *Springhead Case* was short-lived in

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tution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners; and we approve the bill passed by the last session of the United States Senate, and now pending in the House of Representatives, relative to contempt in Federal courts and providing for trials by jury in certain cases of contempt". PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1896) 194-95.

[80] *In re* Debs, Petitioner, 158 U. S. 564, 591-92 (1895). See Chafee, *Progress of the Law* 1919-1920, *Equitable Relief Against Torts* (1921) 34 HARV. L. REV. 388, 395 *et seq.;* Lewis, *A Protest Against Administering Criminal Law by Injunction—The Debs Case* (1894) 33 AM. L. REG. (N. S.) 879.

[81] L. R. 6 Eq. 551 (1868).

[82] L. R. 6 Eq. at 554, 562-63 (1868). On the effect of Prudential Assurance Co. *v.* Knott, L. R. 10 Ch. App. 142 (1875), at least as understood in America, see Sherry *v.* Perkins, 147 Mass. 212, 214 (1888) where the court said: "Some of the language in *Springhead Spinning Co.* v. *Riley* has been criticized, but the decision has not been overruled". But see Boston Diatite Co. *v.* Florence Manufacturing Company, 114 Mass. 69, 70 (1873) and the dissenting opinion of Field, C. J., in Vegelahn *v.* Guntner, 167 Mass. 92, 100 (1896).

England, American courts saw the possibilities of the injunction and bettered the instruction. Unfortunately, the full story of the early development of the labor injunction is not recorded in the law books. It must largely be pieced together from the scrapbooks of history. What appears to be a pioneer attempt at *nisi prius* in New York [83] proved abortive. The facts, as elicited from affidavits, showed to the judge's satisfaction "a combination of the defendants, and an enticement by them of laborers from the plaintiff's shops . . . by means of arguments, persuasion and personal appeals. . . ." That the injunction was denied solely because the court did not believe that the facts as found were tortious is obvious from the court's assumption "without discussing it, that if acts of this description are unlawful . . . [they] would be a proper subject of relief in a court of equity, and would be restrained by injunction." [84]

According to Terence Powderly,[85] one of the important labor leaders in the pre-Gompers era, injunctions were issued in Baltimore in 1883, and at Kent, Ohio, to prevent inducing laborers under contract to quit. In 1884, an injunction was granted in Iowa.[86] Bradstreet's for December 9, 1885,[87] reports an injunction against a boycott and unfair list. In the great railroad strike of 1886,[88] the injunction met repeated favor. During the remaining years of the century the cases grew in volume like a rolling snowball. As they began to find a place in the law reports, there came inevitably an accompanying rationale, an attempt to find room for these bitter industrial conflicts under some old legal categories, and to relate the injunction in labor disputes to time-honored principles of equity jurisdiction.

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[83] Johnston Harvester Company *v.* Meinhardt, 60 How. Pr. 168 (N. Y., 1880), *aff'd* in 24 Hun 489 (N. Y., 1881).

[84] 60 How. Pr. 168, 173.

[85] See WARE, THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895 (1929) *passim*. For much data on the early use of the labor injunction, we are indebted to the valuable paper of Mr. E. E. Witte, *Early American Labor Cases* (1926) 35 YALE L. J. 825, 832.

[86] Keystone Can Co. *v.* Davis. Complete text of the injunction is given in REPORT OF IOWA BUREAU OF LABOR STATISTICS (1885) 155.

[87] At 396.

[88] A resolution of the House of Representatives of April 12, 1886, authorized the appointment of a committee "to investigate the cause and extent of the disturbed condition now existing between the Railway Corporation and their employees". See Report No. 4174, 49th Cong. 2nd sess. See also, SHARFMAN, THE AMERICAN RAILROAD PROBLEM (1921) 317 *et seq.* For reference to numerous unreported injunctions see Witte, *Early American Labor Cases* (1926) 35 YALE L. J. 825, 833, pp. 36-39 inclusive.

A Pennsylvania case, *Brace Bros.* v. *Evans*,[89] is an early example. The bill alleged that, in pursuance of a strike, a number of persons had combined to embarrass the plaintiff's business by "boycotting" him, requesting others to do so, threatening parties dealing with the plaintiff that they in turn would be "boycotted", and following his wagons through the streets with signs, "Boycott Brace Bros. . . ." A preliminary injunction was justified on these grounds: (1) imminent and irreparable injury,[90] (2) multiplicity of actions,[91] (3) financial irresponsibility of the defendants,[92] (4) the practice of equity, exercised for a hundred years without question to protect complainant's business.[93] To sustain the last point, the court referred to equitable protection of trade marks; and met the argument that "the plaintiffs' right to conduct their business is personal, and that equity will not interfere for the protection of mere personal rights, but only to preserve rights of property," by saying: "It cannot be that the strong arm of chancery can be successfully invoked to preserve the accumulations of the rich, and is powerless to protect the capital of the poor, his brain and muscle and power and will to work. . . ."[94]

Here are suggested the chief props of subsequent judicial support. But it took some time for courts to find themselves. Massachusetts, for example, in 1888, restrained the carrying of "keep away" banners, because "it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against."[95] Yet, when four years later this doctrine was invoked against the maintenance of a blacklist, the court said: ". . . the remedy is by indictment . . . [and] by an action of tort . . . there are no approved precedents in equity for enjoining the defendants from continuing such a conspiracy. . . ." [96] It took not a few volumes of Massachusetts Reports to establish the first case as orthodox doctrine and to reject the history and policy implied in the second.[97]

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[89] 5 Pa. Co. Ct. Rep. 163 (1888).

[90] Followed in Murdock, Kerr & Co. *v.* Walker, Appellant, 152 Pa. 595 (1893); Flaccus *v.* Smith, 199 Pa. 128 (1901).

[91] Followed in Wick China Co. *v.* Brown *et al.*, 164 Pa. 449 (1894).

[92] Followed in Steel Co. *v.* Iron Moulders, 12 Ohio Fed. Dec. 417 (1901).

[93] Temple Iron Co. *v.* Carmanoskie *et al.*, 10 Kulp 37 (Pa. 1900).

[94] 5 Pa. Co. Ct. Rep. 163 (1888).

[95] Sherry *v.* Perkins, 147 Mass. 212, 214 (1888).

In the federal courts, judges had become accustomed to equitable relief for labor difficulties arising upon railroads judicially administered through receivers.[98] In such cases, the property being already *in gremio legis,* the court's control by injunction was readily spelt out. It was an easy transition to indulge in such injunctions apart from receiverships.[99] Moreover, in this field federal judges adopted with quick sympathy the practices evolved by the state courts. And, as we shall see, through the familiar process of judicial interpretation Congressional legislation lent itself to the same end.

Thus, with hardly a dissenting voice [100] and sustained by the authority of time-worn maxims, the injunction asserted itself vigorously in the growing conflict of industrial forces in America at the opening of the present century. Even the judge who had doubts silenced them by the reflection that "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent."[101] A device of modest beginnings, the injunction assumed new and vast significance in a national economy in which effective organization and collective action had attained progressive mastery.

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[96] Worthington *v.* Waring, 157 Mass. 421, 422-23 (1892).

[97] The change is noted in Cornellier *v.* Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 560 (1915): "In the light of more recent decisions of the court recognizing that the right to labor and to its protection from unlawful interference is a constitutional as well as a common law right there appears to be no sound reason why it should not be adequately protected under our present broad equity powers. As intimated in *Burnham* v. *Dowd,* 217 *Mass.* 351, 359, the case of *Worthington* v. *Waring* cannot well be reconciled with our later decisions. It must be considered as no longer binding as an authority for the doctrine that equity will afford no injunctive relief against an unlawful combination to blacklist". *Cf.* the dissent of Field, C. J., in Vegelahn *v.* Guntner, 167 Mass. 92, 100 (1896). It is settled doctrine that equity will not withhold injunctive relief on the ground that the acts sought to be restrained are also crimes.

[98] United States *v.* Kane, 23 Fed. 748 (D. Colo., 1885); Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 60 Fed. 803 (E. D. Wis., 1894). See 1 GRESHAM, LIFE OF WALTER QUINTIN GRESHAM (1919) 366 *et seq.*

[99] Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135 (S. D. Ohio, 1891); Cœur d'Alene Consolidated & Mining Co. *v.* Miners' Union, 51 Fed. 260 (D. Ida., 1892); Blindell *v.* Hagan, 54 Fed. 40 (E. D. La., 1893).

[100] But see Standard Distilling Co. *v.* Block & Sons, 5 Oh. N. P. (N. S.) 386 (1907); Longshore Printing Co. *v.* Howell, 26 Ore. 527 (1894); Field, C. J., in Vegelahn *v.* Guntner, 167 Mass., 92, 100 (1896).

JUSTIFIABLE ENDS AND MEANS

The truth to be dealt with is that every measure upon which a labor union relies for acceptance of its demands, involves the curtailment of some temporal interest of employer, non-union employee, and frequently the public. But this presents a problem of tort law generally. For the common law, the Year Books early formulated immunity from legal control in the *dictum* that "Damnum may be without injuria."[102] For modern times, the fountain-head of analysis is Mr. Justice Holmes, in his paper, "Privilege, Malice, and Intent,"[103] and in his opinions in *Vegelahn* v. *Guntner*,[104] *Plant* v. *Woods*,[105] and *Aikens* v. *Wisconsin:*[106]

> ". . . *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law . . . requires a justification if the defendant is to escape."[107]

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[101] Ricks, D. J., in Toledo A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 746, 751 (N. D. Ohio, 1893). See Barr *v.* Essex Trades Council, 53 N. J. Eq. 101 (1894); Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497 (1898). See Allen, *Injunction and Organized Labor* (1894) 28 AM. L. REV. 828; Stimson, *The Modern Use of Injunctions* (1895) 10 POL. SC. Q. 189; 17 REPORT OF THE UNITED STATES INDUSTRIAL COMMISSION (1901) 611; FINAL REPORT OF THE UNITED STATES INDUSTRIAL COMMISSION (1902).

[102] Hankford, J., Y. B., 11 Hen. IV fol. 7 pl. 21. See 4 FOSS, JUDGES OF ENGLAND (1851) 323.

[103] Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1; COLLECTED LEGAL PAPERS (1920) 117.

[104] 167 Mass. 92 (1896).

[105] 176 Mass. 492 (1900).

[106] 195 U. S. 194 (1904). For concurrence in the expressions of Mr. Justice Holmes by English judges, see Sorrel *v.* Smith (1924) 1 Ch. 506; Ware and De Freville, Ld. *v.* Motor Trade Association (1921) 3 K. B. 40. See Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 429, 451; Wigmore, *Justice Holmes and the Law of Torts* (1916) 29 HARV. L. REV. 601; Wigmore, *The Tripartite Division of Torts* (1894) 8 HARV. L. REV. 200. *Cf.* the discussion of Andrews, J., in Foster *v.* Retail Clerks' Protective Ass'n, 39 Misc. 48, 54 (N. Y. 1902): "Is there any reason for saying that intentional injury to another is always, as a matter of fact, wrongful?"

[107] Aikens *v.* Wisconsin, 195 U. S. 194, 204 (1904).

> "There are various justifications."[108] ". . . in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."[109]

The damage inflicted by combative measures of a union—the strike, the boycott, the picket—must win immunity by its purpose. But neither this nor any formula will save courts the painful necessity of deciding whether, in a given conflict, privilege has been overstepped. The broad questions of law—what are permissible purposes and instruments for damage,—and the intricate issues of fact to which they must be applied, together constitute the area of judicial discretion within which diversity of opinion finds ample scope. Thus, in *Plant* v. *Woods* both the majority and the dissenters agreed that "the conduct of the defendants [in threatening boycotts and strikes] is actionable unless justified."[110] But the prevailing judgment, in opposition to the views of Mr. Justice Holmes (then the Chief Justice of Massachusetts) was that the purpose of the threats—unionization—was not enough to invoke the shelter of privilege. In *National Protective Association* v. *Cumming*,[111] a leading New York case, both majority and dissenters based their conclusions on the same printed record. As the majority read it, there was "no pretense that the defendant associations . . . had any other motive than one which the law justifies of attempting to benefit their members by securing their employment."[112] But the dissenting judges extracted this conclusion from the tangle of conduct: "The object of the defendants was not to get . . . better terms for themselves, but to prevent others from following their lawful calling."[113]

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[108] Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1, 3; COLLECTED LEGAL PAPERS (1920) 120.

[109] Holmes, *op. cit.* (1894) 8 HARV. L. REV. 1, 9; COLLECTED LEGAL PAPERS (1920) 130-31.

[110] 176 Mass. 492, 504. The Chief Justice (Holmes) in his dissenting opinion said, ". . . much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one. . . ."

[111] 170 N. Y. 315 (1902).

[112] 170 N. Y. 315, 327 (1902).

[113] 170 N. Y. 315, 342 (1902). For other instances compare Newton Company *v.* Erickson, 70 Misc. 291 (N. Y., 1911) with Bossert *v.* United Brotherhood of Car-

Plainly, the means for adjudication are not simple jural tools. "The ground of decision," again to quote Mr. Justice Holmes, "really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." [114] This is less an analysis of the judicial process than an invitation to self-consciousness in its exercise. But not until the process becomes conscious are its materials and methods susceptible of scientific judgment.[115]

Courts find the "key" to the justification of challenged conduct in labor cases in the purpose of the injury and the means by which it is inflicted. But like the "key" to a city, it unlocks nothing.

When the objectives of concerted action are higher wages, shorter hours and improved working conditions, all measures in

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penters, 77 Misc. 592 (1912). And see Exchange Bakery, Inc. *v.* Rifkin, 245 N. Y. 260, 270 (1927) where three judges dissented on their interpretation of the facts. Judge Crane, for the dissenters, said: "I agree with my brother ANDREWS in his statement of the law, but I disagree in his application of it to the facts of this case." The late Judge Hough, of the Second Circuit Court of Appeals, pointed out that "The English courts devote themselves to deciding the same questions of fact, and find it no easier. *Cf.* the opinions of Lord Shand in Allen *v.* Flood, L. R., 1898, A. C. 1, and Quinn *v.* Leathem, . . . L. R. 1901 A. C., at 538". Gill Engraving Co. *v.* Doerr, 214 Fed. 111, 120 (S. D. N. Y., 1914). See, too, National Fireproofing Co. *v.* Mason Builders' Ass'n, 169 Fed. 259 (C. C. A. 2nd, 1909); Irving *v.* Neal, 209 Fed. 471, 478 (S. D. N. Y., 1913).

[114] Holmes, *Privilege, Malice, and Intent* (1898) 8 HARV. L. REV. 1, 8; COLLECTED LEGAL PAPERS (1920) 128. More recently a distinguished English judge analyzed the psychologic difficulties of adjudication in labor controversies. See Scrutton, *The Work of the Commercial Courts* (1921) 1 CAMB. L. J. 6, 8.

[115] "I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies." *Privilege, Malice, and Intent,* 8 HARV. L. REV. 1, 9; COLLECTED LEGAL PAPERS (1920), 129-30.

themselves not tortious may be employed.[116] Here the benefit to workers is direct and obvious, and the right to combine for such purposes is universally recognized.[117] But when employees aim at a purpose "one degree more remote," namely, to strengthen their union "as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests,"[118] courts vary in their approach to the problem, with resulting conflict in the decisions. Avoiding nice analysis, the federal cases rarely treat "purpose" or "end" in isolation, but always with reference to the clash of events in the particular case. The issue of legality of a strike to unionize a shop or to force the discharge of non-union operators is apt to be disposed of by judgment upon the manner of conducting the strike.[119] This is partly inevitable because of the difficulty of attempting to disentangle the elements that establish justifiable purpose from the damage that is sought to be justified.

In Massachusetts, the rationale for decision shifts almost completely to an emphasis upon the issue of justifiable ends. The analysis for application is the one articulated in the classic dissent by Mr. Justice Holmes in *Vegelahn* v. *Guntner,*[120] and adopted by the majority in *Plant* v. *Woods.*[121] Self-interest, in its undefined amplitude, is the end that justifies. But of the innumerable ways in which self-interest may be asserted, only those grant immunity which have "a direct relation to benefits that the laborers are trying to obtain." [122] Obviously this is a test implying judgment on economic and social data; yet it is treated as "a question of law to be decided by the court." [123] Applying it, the Massachusetts Supreme Court recognizes as legal a strike for higher wages, shorter hours and improved shop conditions; [124] here the self-interest is patent, or rather patently immediate. But a strike instituted to compel a closed union-shop is, according to the Massachusetts Court, of no "importance to these employees, in reference to their profit or comfort, or other direct interest as employees." [125] And "In the debatable ground between these extremes the conflict of rights must be adjusted as new conditions arise." [126] The debate has usually resulted in a denial of the employee's claims. So, a strike to get rid of a foreman because some of the employees disliked him; [127] to compel an employer to pay a fine imposed by the union for breach of some promise; [128] to compel an employer to hire more help than he wanted; [129] to obtain the reinstatement of a discharged employee; [130] to secure the discharge of non-union employees; [131] these and numerous other purposes have been held illegal.[132] However questionable the conclusion may be in the light of the industrial conflict, these decisions necessarily mean that the enumerated purposes have no "direct relation to benefits that the laborers are trying to obtain." [133]

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[116] Arthur *v.* Oakes, 63 Fed. 310 (C. C. A. 7th, 1894); Ames *v.* Union Pac. Ry. Co., 62 Fed. 7 (D. Neb., 1894); Thomas *v.* Cincinnati, N. O. & T. P. Ry., 62 Fed. 803 (S. D. Ohio, 1894); Commonwealth *v.* Hunt & others, 4 Met. 111 (Mass., 1842); L. D. Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110, 113, 114, 130 (1908); M. Steinert & Sons Co. *v.* Tagen, 207 Mass. 394, 396 (1911).

[117] See Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 209 (1921).

[118] Holmes, C. J., in Plant *v.* Woods, 176 Mass. 492, 505 (1900).

[119] See COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1927) 98. But *cf.* National Fireproofing Co. *v.* Mason Builders' Ass'n., 169 Fed. 259 (C. C. A. 2nd, 1909) and Coppage *v.* Kansas, 236 U. S. 1, 19 (1915).

[120] 167 Mass. 92, 104 (1896).

[121] 176 Mass. 492 (1900).

[122] Folsom *v.* Lewis, 208 Mass. 336, 338 (1911).

[123] DeMinico *v.* Craig, 207 Mass. 593, 598 (1911); Cornellier *v.* Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 562 (1915).

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[124] Cornellier *v.* Haverhill Shoe Mfrs. Assoc., 221 Mass. 554 (1915); Minasian *v.* Osborne, 210 Mass. 250 (1911).

[125] Folsom *v.* Lewis, 208 Mass. 336, 338 (1911); Martineau *v.* Foley, 225 Mass. 107 (1916); W. A. Snow Iron Works, Inc. *v.* Chadwick, 227 Mass. 382 (1917).

[126] Cornellier *v.* Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 562 (1915).

[127] DeMinico *v.* Craig, 207 Mass. 593 (1911).

[128] Carew *v.* Rutherford, 106 Mass. 1 (1870).

[129] Haverhill Strand Theater Inc. *v.* Gillen, 229 Mass. 413 (1918). *Cf.* a *contra* case in Minnesota, Scott, Stafford Opera H. Co. *v.* Minneapolis M. Assn., 118 Minn. 410 (1912).

[130] Mechanics Foundry & Machinery Co. *v.* Lynch, 236 Mass. 504 (1920).

[131] Martin *v.* Francke, 227 Mass. 272 (1917).

[132] L. D. Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110 (1908); Moore Drop Forging Co. *v.* McCarthy, 243 Mass. 554 (1923). In the 1929 session of the Massachusetts legislature, a bill, House No. 887, was introduced to legalize strikes "or other concerted action" where the purposes sought to be attained were, *inter alia,* the closed-shop and collective bargaining. On May 9, 1929, this bill was defeated. Boston Herald, May 10, 1929, p. 14, col. 6.

[133] Folsom *v.* Lewis, 208 Mass. 336, 338 (1911). When a strike is motivated by a number of purposes, some of which are legal and others illegal, it is "Without question . . . an illegal strike". Baush Machine Tool Co. *v.* Hill, 231 Mass. 30, 36 (1918); Folsom Engraving Co. *v.* McNeil, 235 Mass. 269 (1920). But *cf.* L. D. Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110, 114 (1908): "Such a strike must be treated as a justifiable strike so far as respects its ultimate object."

The effort at unionization has provoked the central conflict in the Massachusetts courts.[134] Knowlton C.J. thus summed up the result of numerous cases: "Strengthening the forces of a labor union, to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to strike."[135] To this attitude Mr. Justice Holmes had earlier made reply: "I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."[136]

New York adopts the views which Massachusetts rejected. The New York Court of Appeals recently stated explicitly what had long been the *motif* of its decisions—that there is too intimate a relation in fact between unionization and economic betterment for law to deny.[137] Therefore, a group outside a particular shop may have weighty self-interest in procuring the unionization of that shop. "Economic organization to-day," writes Andrews, J., "is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally."[138] Such a purpose is "in the eye of the law thought sufficient to justify the harm."[139]

And even in Massachusetts the "eye of the law" is more indulgent than it professes to be. An agreement voluntarily entered into by an employer not to use any non-union made materials[140] is valid, although a strike to enforce such an agreement [141] is beyond the pale. Similarly an agreement between an employer and a union, voluntarily entered into,[142] whereby the employer promises to hire only union men,[143] or to give them preference,[144] or to give all his work to members of the union [145] will be given legal protection against interference or breach.

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[134] Plant *v.* Woods, 176 Mass. 492 (1900); Aberthaw Construction Co. *v.* Cameron, 194 Mass. 208 (1907); Reynolds *v.* Davis, 198 Mass. 294 (1908); Folsom *v.* Lewis, 208 Mass. 336 (1911); Folsom Engraving Co. *v.* McNeil, 235 Mass. 269 (1920).

[135] Folsom *v.* Lewis, 208 Mass. 336, 338 (1911).

[136] Plant *v.* Woods, 176 Mass. 492, 505 (1900).

[137] Exchange Bakery and Restaurant Inc. *v.* Rifkin, 245 N. Y. 260 (1927).

[138] Exchange Bakery and Restaurant Inc. *v.* Rifkin, 245 N. Y. 260, 263 (1927). See also notes in (1921) 34 HARV. L. REV. 880; (1928) 40 HARV. L. REV. 886.

[139] Exchange Bakery and Restaurant Inc. *v.* Rifkin, 245 N. Y. 260, 263 (1927).

[140] A. T. Stearns Lumber Co. *v.* Howlett, 260 Mass. 45, 66 (1927).

The means by which organized labor exerts economic pressure reduce themselves, in the main, to the strike, the picket and the boycott, in their various manifestations. The right to strike for a "lawful purpose", *i.e.*, a concerted cessation of work "in order by this inconvenience to induce him [the employer] to make better terms . . . has in many years not been denied by any court." [146] But the picket and the boycott have presented themselves as problems of greater perplexity to the courts. Resort to these industrial devices has been differently viewed in different jurisdictions; nor are the pronouncements on this subject by a single tribunal always uttered with clarity.

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[141] *Ibid.*

[142] Braley, J., in United Shoe Machinery Corp. *v.* Fitzgerald, 237 Mass. 537, 543 (1921), quoting from Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 250 (1917): "Whatever may be the advantages of 'collective bargaining', it is not bargaining at all, in any just sense, unless it is voluntary on both sides". *Cf.*, however, this bit of realism also from a Massachusetts judge: "But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful". Pickett *v.* Walsh, 192 Mass. 572, 584 (1906), *per* Loring, J.

[143] Ryan *v.* Hayes, 243 Mass. 168 (1922).

[144] Hoban *v.* Dempsey, 217 Mass. 166 (1914).

[145] Tracey *v.* Osborne, 226 Mass. 25 (1917); Shinsky *v.* O'Neil, 232 Mass. 99 (1919). See Pickett *v.* Walsh, 192 Mass. 572 (1906); Minasian *v.* Osborne, 210 Mass. 250 (1911). So, in New York, Jacob *v.* Cohen, 183 N. Y. 207 (1905); Mills *v.* United States Printing Co., 99 App. Div. 605 (N. Y., 1904). But the agreement is no defense to the union in an action against it by non-union employees whose discharge was directly caused by the agreement. Berry *v.* Donovan, 188 Mass. 353 (1905); DeMinico *v.* Craig, 207 Mass. 593 (1911); Hanson *v.* Innis, 211 Mass. 301 (1912); Shinsky *v.* Tracey, 226 Mass. 21 (1917). And see Smith *v.* Bowen, 232 Mass. 106 (1919).

[146] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 209 (1921). But see PARKER, THE CASUAL LABORER (1920) 171-99; BING, WAR-TIME STRIKES AND THEIR ADJUSTMENT (1921) 29 *et seq.* And see these cases: West Virginia Traction & E. Co. *v.* Elm Grove Min. Co., 253 Fed. 772 (N. D. W. Va., 1918); Wagner Elec. Mfg. Co. *v.* District Lodge No. 9 I. A. of M., 252 Fed. 597 (E. D. Mo., 1918); Rosenwasser Bros., Inc. *v.* Pepper, 104 Misc. 457, 461 (N. Y., 1918). In the last case, the court said: ". . . the principles announced in cases which arose before the war cannot be applied to the relation between workers and employers in war industries. . . ." See (1921) 34 HARV. L. REV. at 400 *et seq.;* (1920) 5 CORN. L. Q. 184; Mason, *The Right to Strike* (1928) 77 U. OF PA. L. REV. 52.

New York [147] and Massachusetts,[148] though differing as to the allowable scope, are agreed that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance. But in Massachusetts the privilege of picketing may be invoked only when there is a strike in the very technical sense of that word, that is, when the adversary's own employees have quit work.[149] The impression that such also was the New York law has now been dispelled: "Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured." [150]

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[147] Rogers *v.* Evarts, 17 N. Y. Supp. 264 (1891), *aff'd* 144 N. Y. 189 (1894); Foster *v.* Retail Clerks' Protective Assn., 39 Misc. 48, 57 (1902); Mills *v.* United States Printing Co., 99 App. Div. 605 (1904), *aff'd* 199 N. Y. 76 (1910).

[148] Peaceful Persuasion Act, Mass. Gen. L. (1921), c. 149, § 24. *Cf.* Martineau *v.* Foley, 231 Mass. 220 (1918); Folsom Engraving Co. *v.* McNeil, 235 Mass. 269 (1920); Walton Lunch Co. *v.* Kearney, 236 Mass. 310 (1920); Godin *v.* Niebuhr, 236 Mass. 350 (1920); Rice, Barton & Fales Machine &c. Co. *v.* Willard, 242 Mass. 566 (1922).

[149] Harvey *v.* Chapman, 226 Mass. 191 (1917). And picketing apparently is forbidden where the employer has "secured men to take the places of the strikers, has had ever since an adequate force, and is not seeking any new men". M. Steinert & Sons Co. *v.* Tagen, 207 Mass. 394, 397 (1911); or where ". . . with a few exceptions all the men who left the plaintiff's employ have secured employment elsewhere . . . the plaintiff's business . . . [is] being operated in a normal and usual manner . . . and the places of all the union men who had left its employ were filled". Moore Drop Forging Co. *v.* McCarthy, 243 Mass. 554, 560 (1923). But it should be noted that in the first case equitable relief was not sought until five and a half months after the strike was declared, and in the second case equitable relief was not sought until nearly a year and a half after the strike began. Thus the language in Densten Hair Co. *v.* United Leather Workers, 237 Mass. 199, 203 (1921) is still significant for a full statement of Massachusetts law: ". . . whether a strike instituted for a lawful purpose can be determined and made illegal, without the knowledge and consent of the striking employees, by filling their positions with permanent new employees . . . is a moot question . . ." On this whole subject see notes in (1927) 40 HARV. L. REV. 896; (1927) 36 YALE L. J. 557; (1927) 27 COL. L. REV. 190. Two significant federal cases are Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1920) and Quinlivan *v.* Dail-Overland Co. 274 Fed. 56 (C. C. A. 6th, 1921).

[150] Exchange Bakery & Restaurant, Inc. *v.* Rifkin, 245 N. Y. 260, 263 (1927). A subsequent decision of a court at *nisi prius* followed this ruling. Colville, Inc. *v.* Weintraub, N. Y. L. J., June 5, 1928, p. 1160 (Sp. T. Part I, 1st Dept.). Said the court (Mr. Justice Valente): "Since the decision in Exchange Bakery &

Federal decisions betray an inner conflict. One court is certain that "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."[151] Even the Supreme Court decision which sanctioned a form of picketing, strictly confined its employment because of its conception of the implications of the label: "The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion."[152] Yet other federal courts have recognized as permissible what they call picketing, "that is to say, the detachment of men in suitable places for the purpose of coming into personal relations with the new workmen, in order . . . to induce them, by means of peaceful argument, to leave the places which they have taken. . . ."[153]

Restaurant, Inc., *v.* Rifkin (245 N. Y., 260) the law in this state has been fixed to the effect that a labor union may call a strike and picket the premises of an employer with the intent of inducing him to employ union labor. The fact that plaintiff's non-union employees are satisfied with their working conditions is no bar to efforts in that direction." Some judges of first instance, however, have granted an injunction. See Stern & Mayer, Inc. *v.* United Neckwear Makers' and Cutters' Unions, *N. Y. Times,* July 9, 1928, p. 21, col. 4.

[151] Atchison, T. & S. F. Ry. Co. *v.* Gee, 139 Fed. 582, 584 (S. D. Ia., 1905).

[152] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 205 (1921). All picketing is held to be illegal in these federal cases: Consolidated Steel & Wire Co. *v.* Murray, 80 Fed. 811 (N. D. Ohio, 1897); Otis Steel Co. *v.* Local Union No. 218, 110 Fed. 698 (N. D. Ohio, 1901); Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901); Kolley *v.* Robinson, 187 Fed. 415 (C. C. A. 8th, 1911); Sona *v.* Aluminum Castings Co., 214 Fed. 936 (C. C. A. 6th, 1914). Following are some of the leading state decisions to the same effect: Pierce *v.* Stablemen's Union, 156 Cal. 70 (1909); Barnes *v.* Typographical Union, 232 Ill. 424 (1908); Lyon & Healy *v.* Piano Work. Union, 289 Ill. 176 (1919); Beck *v.* Teamsters' Protective Union, 118 Mich. 497 (1898); Clarage *v.* Luphringer, 202 Mich. 612 (1918); Jonas Glass Co. *v.* Glass Bottle Blowers' Association, 72 N. J. Eq. 653 (1907), *aff'd* 77 N. J. Eq. 219 (1908); Baldwin Lumber Co. *v.* Brotherhood, &c, 91 N. J. Eq. 240 (1920).

[153] Pope Motor Car Co. *v.* Keegan, 150 Fed. 148, 149 (N. D. Ohio, 1906). Relief against such tactics has been frequently denied. Goldfield Consol. Mines Co. *v.* Goldfield M. U. No. 220, 159 Fed. 500, 521 (D. Nev., 1908); Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908); Bittner *v.* West Virginia-Pittsburgh Coal Co., 214 Fed. 716 (C. C. A. 4th, 1914); Niles-Bement-Pond Co. *v.* Iron Molders' Union, L. No. 68, 246 Fed. 851, 860 (S. D. Ohio, 1917); Bittner *v.* West Virginia-Pittsburgh Coal Co., 15 F. (2d) 652 (C. C. A. 4th, 1926); Jones *v.* Van Winkle Machine Works, 131 Ga. 336, 340 (1908); Karges Furniture Co. *v.* Amalgamated, etc., Union, 165 Ind. 421, 430, 431 (1905); Steffes *v.* Motion Picture M. O. U., 136 Minn. 200 (1917); Greenfield *v.* Central Labor Council, 104 Ore. 236 (1922); Everett Waddey Co. *v.* R. T. Union, 105 Va. 188, 197 (1906).

The Clayton Act (section 20), attempting to formulate a uniform policy for the United States courts, provided that ". . . no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment . . . or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person . . . to abstain from working. . . ."[154]

But to the Supreme Court "This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always."[155] And it was a matter "to be observed" that "Congress carefully refrained from using in § 20" "the sinister name of 'picketing.'"[156] The net result of federal legislation and the Supreme Court rulings is to prevent "the inevitable intimidation of the presence of groups of pickets," but to allow "missionaries."[157]

Nowhere may picketing be accompanied by violence;[158] and where violence softens into "intimidation," "threats" or "coercion"[159] the result is the same, because analysis assumes the inevitability of violence, and judgment upon conduct in these cases, as we shall see, rests confidently upon the allegations of affidavits. A "threat" may be a warning of violence; it may also be merely a warning that one will do a legally permissible act.[160] "Coercion" may be physical compulsion; it may also imply merely the exertion of economic pressure.[161] "Persuasion" may be insult and menace; it may also be an appeal to free judgment. A vocabulary so freighted with ambiguity easily lends itself to a fictitious issue, by confounding assumed conduct with the real conduct whose justifiability is in question. Unwittingly a court may be pronouncing judgment upon the implications of a label,[162] instead of weighing the elements of an industrial conflict as it actually transpired. These situations make a heavy demand upon intellectual detachment and require a sturdy hold upon reality. They call for understanding and imagination rather out of the current of judicial experience. It is the rare judge who sees that "men become earnest and excited and vigorous at such times. . . . The fervor of argument is upon them. . . . They forget etiquette and grammar. . . . Instigated by emotion and impelled by deep conviction men always employ strong words. . . . The nomenclature of the strike is not the language of the parlor" . . . "the non-union men were in no manner frightened or cowed by this . . . they displayed a courage and defiance and employed language which fully matched the temper and talk of the strikers." [163]

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[154] 38 STAT. 738 (1914).

[155] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 203 (1921).

[156] 257 U. S. at 207.

[157] Specifically, this, in the Chief Justice's words, is the permitted conduct: "We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps." But this statement is prefaced by the suggestion: "Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it." 257 U. S. at 206-07. For full treatment of the judicial history of the Clayton Act, see Chapter IV, p. 165 *et seq.*

[158] Pope Motor Car Co. *v.* Keegan, 150 Fed. 148 (N. D. Ohio, 1906); Goldfield Consol. Min. Co. *v.* Goldfield M. U. No. 220, 159 Fed. 500 (D. Nev., 1908); Kolley *v.* Robinson, 187 Fed. 415 (C. C. A. 8th, 1911); Butterick Pub. Co. *v.* Typo. Union No. 6, 50 Misc. 1 (N. Y., 1906). But *cf.* Boiler & Engine Co. *v.* Benner, 14 Ohio Dec. 357 (1904) where an injunction was denied on the ground that the criminal law was adequate to deal with violence.

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[159] Kolley *v.* Robinson. 187 Fed. 415 (C. C. A. 8th, 1911); Sun Printing & Publishing Assn. *v.* Delaney, 48 App. Div. 623 (N. Y., 1900); Kerbs *v.* Rosenstein, 56 App. Div. 619 (N. Y., 1900); Herzog *v.* Fitzgerald, 74 App. Div. 110 (N. Y., 1902); Berg Auto Trunk etc. Co. *v.* Wiener, 121 Misc. 796 (N. Y., 1923); Martin *v.* Francke, 227 Mass. 272 (1917); United Shoe Machinery Corp. *v.* Fitzgerald, 237 Mass. 537 (1921); Rice, Barton & Fales Machine &c Co. *v.* Willard, 242 Mass. 566 (1922).

[160] "As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences". *per* Holmes, J., in Vegelahn *v.* Guntner, 167 Mass. 92, 107 (1896). To the same effect see Peterson, J., in Hodges *v.* Webb [1920] 2 Ch. 70. 88; Eve, J., in Wolstenheme *v.* Ariss [1920] 2 Ch. 403, 408; Atkin and Scrutton L. JJ. in Ware and De Freville Ld. *v.* Motor Trade Association [1921] 3 K. B. 40 at 69 *et seq.*, and 81 *et seq.* In the last case Lord Scrutton said: "I respectfully concur on this point with the admirable judgment of Holmes J., in *Vegelahn* v. *Guntner,* where he remarks that the unlawfulness of 'threats' depends on what you 'threaten', and of 'compulsion' on how you 'compel'. . . . In my humble judgment the discussion of this question would be much more lucid if the disputants would observe certain simple rules. First, to avoid question-begging epithets, such as 'boycotting', 'ostracism', 'the pillory', 'coercion', and the like. Secondly, when they use the word 'maliciously' to say in what sense they use it. . . . Thirdly, to have in mind the criticism of Bowen, L. J. in the *Mogul Case,* approved by Lord Watson in *Allen* v. *Flood,* on the use of the words 'wrongfully', 'injure', 'maliciously'." at 69. (From this quotation are omitted citations appearing in the original report.)

[161] See for an example of what has been held to constitute "coercion", L. D. Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110, 126 (1908). The union's imposition of fines upon those of its own members who refused to join a strike was held an illegal method of coercion and intimidation. *Cf.* Ryan *v.* Hayes, 243 Mass. 168, 173 (1922) where Braley J. said: "In joining the union he 'engaged to be bound by its rules and subjected himself to its discipline'. *Shinsky* v. *Tracey,* 226 Mass. 21, 22". A statute was passed to correct the ruling in the Driscoll Case, Mass. Gen. L., c. 180, § 19. Mass. Acts, 1911, c. 431, W. A. Snow Iron Works, Inc. *v.* Chadwick, 227 Mass. 382, 392 (1917).

In King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257, 258 (C. C. A. 6th, 1920), the trial court's finding that words and acts to which there would have been no objection if addressed to or used against white men, constituted unlawful intimidation when used against colored men, was sustained. Said the Court:

The legal issues presented by "picketing" and "peaceful persuasion" have in recent years been complicated by concomitant

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"Whether or not we can take judicial notice ourselves of the supposed fact, certainly we cannot disregard the finding of the trial judge that it is a fact that, in that community and at the time in question, speech and action by white men would intimidate and terrify the typical colored laboring man, when the same things would not have serious effect upon the typical white laborer."

[162] "When for 'conspiracy' we substitute 'agreement', and for 'threats' a 'notice', the whole fabric of the plaintiff's case falls to the ground. 'There are', says Dr. Lieber (Civil Liberty and Government), 'psychological processes which indicate suspicious intentions'; and among them is the use of high-sounding and portentous terms, from which much may be implied or imagined. . . ." *per* Caldwell J. Dissenting in Hopkins *v.* Oxley Stave Co. 83 Fed. 912, 924 (C. C. A. 8th, 1897). "Stripped of its verbiage, generalities and conclusions, the complaint seems remarkably barren". *per* Howard J., in Wood Mowing & Reaping M. Co. *v.* Toohey, 114 Misc. 185. 190 (N. Y., 1921). See Nat. Protective Assn. *v.* Cumming, 170 N. Y. 315 (1902).

[163] Wood Mowing & Reaping M. Co. *v.* Toohey, 114 Misc. 185, 188, 189 (N. Y., 1921). "The danger of intimidation and attack is not confined to aggressions by strikers. The impartial history of strikes teaches that there is as much danger to strikers on the picket line from private detectives and sometimes from new employés, as there is of the same kind of wrong on the part of strikers against new employés". *per* Amidon J., in Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 418 (D. N. Dak. 1923). For further discussion and illustration of this, see Chapter III, pp. 120-122.

claims of breach of contract between an employer and his non-union employees, and between an employer and his customers.[164] The ancient common law action allowed to a master for the forcible taking away of his servant,[165] extended, after the fourteenth century Ordinance[166] and Statute of Labourers[167] to enticement of a servant even without force, was in the middle nineteenth century advanced by an English court to support an action for intentionally inducing breach of a fixed term contract of employment.[168] Eventually, both in America and in England, the traditional limits of "enticement" and of "master and servant" were wholly disregarded in the uses to which the legal categories were put. "Malice" as a requisite of the tort was quickly transformed into a mere word of art;[169] the relationships protected expanded from those based upon a fixed term employment to employments terminable at will. The broad doctrine of "interference with contract relations" has thus been widely invoked in labor controversies. A strike and its consequences may prevent the employer from fulfilling his manufacturing or sales contracts; it has been held that the persons contracting with the employer have rights of action against the union and the strikers.[170] The union may induce the employer to discharge non-union employees in violation of a fixed term employment or one at will; opinion as to the legality of this conduct is divided.[171] Finally, union workers and organizers may try to persuade and induce the employees of the plaintiff either to quit work in violation of a fixed term employment or one at will, or to join the union despite a contract with the employer not to do so while remaining in such employ. The last situation, arising from the extended use by employers of what has come to be called the "yellow dog" contract,[172] has stimulated the most far-reaching contemporary development in legal dogma affecting industrial relations.

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[164] See Wigmore, *Interference with Social Relations* (1887) 21 AMER. L. REV. 764; Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663; Cook, *Privileges of Labor Unions in the Struggle for Life* (1918) 27 YALE L. J. 779.

[165] See Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663, citing at p. 665, n. 3, Y. B. 11 Hen. IV, 23, 46 (1410). For an acute analysis of the subject, see Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728.

[166] 23 Edw. III (1349).

[167] 25 Edw. III (1350).

[168] Lumley *v.* Gye, 2. E. & B. 215 (1853). Said Mr. Justice Crompton, expressing one of the majority opinions: "I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously procures* a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services *during the period for which she had so contracted,* whereby the plaintiff was injured." at 229-30. Mr. Justice Coleridge, dissenting, said: ". . . in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 23 *Edw.* 3, and both on principle and according to authority is limited by it." at 245.

[169] Lord Lindley, in South Wales Miners' Federation *v.* Glamorgan Coal Company [1905] A. C. 239, 255: "My Lords, I have purposely abstained from using the word 'malice'. Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding."

Landmark opinions were delivered by the Supreme Court of the United States in *Hitchman Coal Co.* v. *Mitchell*[173]—opinions that directed the line of future decisions in the federal courts, and by force of example, if not authority, in many state courts. Without knowledge of the background of industrial controversy in the American coalfields,[174] the *Hitchman Case* loses most of its meaning. Its setting was the non-union Panhandle coal district of West Virginia whose product, brought into competition with the coal produced under union conditions in Ohio, Indiana, Illinois and western Pennsylvania, was a fatal thrust at the continuance of union conditions in the organized areas. In 1907, therefore, the United Mine Workers began an aggressive campaign for the unionization of the West Virginia mines as a necessary condition, so the workers conceived it, of the union's survival even in the fields where it had already won and maintained recognition.[175] The crucial facts of the *Hitchman Case* are simple.

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[170] Carroll *v.* Chesapeake & O. Coal Agency Co., 124 Fed. 305 (C. C. A. 4th, 1903); Dail-Overland Co. *v.* Willys-Overland Co., 246 Fed. 851 (N. D. Ohio, 1920); Niles-Bement-Pond Co. *v.* Iron Molders' Union, 246 Fed. 851 (S. D. Ohio, 1917), *rev'd* on other grounds, 258 Fed. 408 (C. C. A. 6th, 1918); Vonnegut Machinery Co. *v.* Toledo Machine & Tool Co., 263 Fed. 192 (N. D. Ohio, 1920). And see (1918) 31 HARV. L. REV. 1017.

[171] Baush Machine Tool Co. *v.* Hill, 231 Mass. 30 (1918); Thomas *v.* Mutual Protective Union, 49 Hun. 171 (N. Y., 1888). *Contra* Nat. Protective Ass'n *v.* Cumming, 170 N. Y. 315 (1902).

[172] *The "Yellow Dog" Device as a Bar to the Union Organizer* (1928) 41 HARV. L. REV. 770; Cochrane, *Attacking the "Yellow Dog" in Labor Contracts* (1925) 15 AMER. LAB. LEG. REV. 151; Cochrane, *Why Organized Labor is Fighting "Yellow Dog" Contracts* (1925) 15 AMER. LAB. LEG. REV. 227. And see Chapter IV, p. 148. The correlative situation has been thus sketched by the New York Court of Appeals: "Nor need we discuss the correlative question as to how far contracts made by unions with their members, providing that they are to work only in union shops, are to be protected." Exchange Bakery & Restaurant, Inc. *v.* Rifkin, 245 N. Y. 260, 267 (1927). This problem is discussed in Stern, *A New Legal Problem in the Relation of Capital and Labor* (1926) 74 U. OF PA. L. REV. 523.

[173] 245 U. S. 229 (1917).

The superintendent of the Hitchman Coal Company exacted from each employee, at first orally and later in writing, a stipulation that he would not become a member of the United Mine Workers of America while in the employ of the company. Thereafter, union organizers persisted in proselytizing among the miners, and persuaded them to sign statements agreeing to join the union and to strike when called upon to do so. This conduct was enjoined, on the ground that the plaintiff had the right to require its employees not to join the union, and that, even in the absence of a contract for a definite term of employment, the plaintiff had a pecuniary interest, protected by equity, that the workers should continue on the job. The Court, with Holmes, Brandeis and Clark JJ. dissenting, announced that "the right of action for persuading an employee to leave his employer is universally recognized . . . and it rests upon fundamental principles of general application, not upon the English statute of laborers."[176] But in a subsequent decision,[177] the Supreme Court declined to enjoin an "outside" union (*i.e.*, in contradistinction to an organization restricted to the employees of a specific enterprise, commonly known as a company or within-the-family union) from inducing employees to quit work, and rested the *Hitchman* decision on "the unlawful and deceitful means" found in that case by a majority of the Court.[178] The present Chief Justice significantly recognized that "employees must make their combination extend beyond one shop . . . because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood."[179] The implications of this undoubted economic fact inevitably call for a much broader grant of immunity for attempts at unionization than lower federal courts have been willing to concede. When those courts hold, as they have held, that the "outsider" has no "right to instigate a strike,"[180] they fail to apply in action the logic of the Chief Justice's reasoning.

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[174] See SUFFERN, CONCILIATION AND ARBITRATION IN THE COAL INDUSTRY OF AMERICA (1915); UNITED STATES COAL COMMISSION REPORT DEC. 10, 1923, parts II and III; HUNT, TRYON AND WILLITS, WHAT THE COAL COMMISSION FOUND (1925) 230 *et seq.*, 327 *et seq.* See debate in United States Senate during February 1928, resulting in adoption of resolution directing the investigation into conditions in the bituminous coal-fields of Pennsylvania, West Virginia, and Ohio. (69th CONG. REC. 3159 *et seq.* (1928).

[175] See, *e.g.*, the discussion of Chief Justice Taft in the Coronado Case, 259 U. S. 344, 408 (1922): "What really is shown by the evidence in the case at bar, drawn from discussions and resolutions of conventions and conference, is the stimulation of union leaders to press their unionization of non-union mines not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators which in turn would lessen the pressure of those operators for reduction of the union scale or their resistance to an increase."

In Massachusetts, inducements of a breach of contract of employment for a term has, at least tacitly, been deemed illegal.[181] When the contract is "at will", the extent of protection against interference by outsiders is still in doubt.[182] New York has adopted a cautious process of empiricism. The ancient doctrine of malicious incitement of servants and laborers was first rejected,[183] leaving the question still mooted, however, whether union tactics directed to the inducement of a breach of contract for a term were ever justifiable.[184] Very recently the New York Court of Appeals came to somewhat closer grips with the problem. In *Interborough Rapid Transit Co.* v. *Lavin,*[185] the Court had before it one phase of the obstinate industrial conflict between management and men on the transit lines in New York City. To thwart affiliation between its men and the American Federation of Labor (through the Amalgamated Association of Street and Electric Railway Members of America), the Interborough fostered the formation of a company union and barred membership of its employees in the national union. To protect this arrangement against interference by the Amalgamated organizers was the aim of the resort to equity in the *Lavin Case*. The Court of Appeals found that the employees had not made any "express promise" [186] to the Interborough to refrain from joining the

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[176] 245 U. S. at 252. Though Mr. Justice Pitney's language in the Hitchman Case, —for example, "universally recognized"—is emphatic, he advanced only four cases in support of the proposition. These are Thacker Coal Co. *v.* Burke, 59 W. Va. 253 (1906); Walker *v.* Cronin, 107 Mass. 555 (1871); Angle *v.* Chicago, St. Paul &c Railway Co., 151 U. S. 1, 13 (1893); Noice, Adm'x, *v.* Brown, 39 N. J. L. 569, 572 (1877). In the first two cases malice was averred with complaint and admitted by the demurrer; the last two did not involve enticement of laborers. *Accord* Eagle Glass & Mfg. Co. *v.* Rowe, 245 U. S. 275 (1917); Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1920); Kinloch Telephone Co. *v.* Local Union No. 2, 275 Fed. 241 (C. C. A. 8th, 1921); Central Metal Products Corporation *v.* O'Brien, 278 Fed. 827 (N. D. Ohio, 1922). But see Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56 (C. C. A. 7th, 1921); Diamond Block Coal Co. *v.* U. M. W. A., 188 Ky. 477 (1920).

[177] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184 (1921).

[178] 257 U. S. at 211. "The unlawful and deceitful means used were quite enough to sustain the decision of the court without more." *Cf.* Harley & Lund Corporation *v.* Murray Rubber Co., 31 F. (2d) 932, 934 (C. C. A. 2nd, 1929).

[179] 257 U. S. at 209.

[180] "The right of the employee to strike does not give the outsider the right to instigate a strike". Montgomery *v.* Pacific Electric Ry. Co. 293 Fed. 680, 688 (C. C. A. 9th, 1923); Waitresses' Union, *et al.* *v.* Benish Restaurant Co., 6 F. (2d) 568 (C. C. A. 8th, 1925).

[181] Reynolds *v.* Davis, 198 Mass. 294 (1908); Walker *v.* Cronin, 107 Mass. 555 (1871).

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[182] See Minasian *v.* Osborne, 210 Mass. 250, 255 (1911) *per* Rugg, C. J.: "While the plaintiffs' contractual rights to labor, although terminable at will, were entitled to protection against wanton interference . . . they were not so assured or valuable in their nature as are valid contracts for continued service for a definite period. It may well be that a stronger reason might be needed to justify interference with such contracts than with those here in question". And see Boston Glass Manufactory *v.* Binney, 4 Pick. 425 (Mass. 1827); Loring J. in Beekman *v.* Marsters, 195 Mass. 205, 211 (1907).

[183] Johnston Harvester Company *v.* Meinhardt, 60 How. Pr. 168 (N. Y., 1880), *aff'd* 24 Hun. 489 (N. Y., 1881); Rogers *v.* Evarts, 17 N. Y. Supp. 264 (1891), *aff'd* 144 N. Y. 189 (1894).

[184] In Exchange Bakery & Restaurant, Inc. *v.* Rifkin, 245 N. Y. 260, 267 (1927) the court, *per* Andrews, J., said: "Here, however, we do not need to decide whether where the object of the act is to aid in a labor dispute, there is just cause or excuse for such interference with existing contracts, and if not how specific the contract must be, nor how substantial the term of employment contained therein to permit equity to intervene". But several New York courts of first instance have decided the question in the negative. Cook *v.* Wilson, 108 Misc. 438 (N. Y., 1919); Michaels *v.* Hillman, 111 Misc. 284 (N. Y., 1920); Best Service Wet Wash Laundry Co., Inc. *v.* Dickson, 121 Misc. 416 (N. Y., 1923); Vail-Ballou Press Inc. *v.* Casey, 125 Misc. 689 (N. Y., 1925). Nevertheless, even in these courts, inducement to breach of contract is held justified where the union had no notice of the contracts. Piermont *v.* Schlesinger, 196 App. Div. 658 (N. Y., 1921).

[185] 247 N. Y. 65 (1928).

[186] *Ibid.* 78.

Amalgamated while in the Interborough's employ, but that there was only an "understanding" [187] to observe this abstention. Therefore, the court concluded, the union was justified in its attempted seduction of the Interborough employees, even though the procedure "may involve termination of present employment and consequent disruption of a business organization." [188] Nor was the union under obligation to the plaintiff "to inform it that some of the plaintiff's employees are joining the union." [189]

Undoubtedly the *Lavin Case* discloses independence of the *Hitchman* doctrine and the cases that followed.[190] But the significance of the *Lavin* decision lies in its atmosphere and mode of approach rather than in the explicitness of its doctrine. Concreteness and caution characterize the opinion. There is the closest reliance upon the record in the case. The opinion is studded with such phrases as "the facts shown," [191] "The record does not show," [192] "it is not justified upon this record," [193] "That question has not been argued on this appeal. We do not answer it now. Many factors must enter into its solution. Not all appear in this record," [194] "the circumstances disclosed by the record." [195] Here is an obvious anxiety not to say too much, not to embarrass future decisions by *dicta*. Therefore, the case is also important because of what it leaves undecided. The court does not "decide . . . now" [196] whether employees may lawfully be urged to join the union when there is a "definite contract"[197] between an employer and employees that the latter should not do so while under contract for a definite term; the court does not answer now whether the union is justified in urging employees to conceal from their employer membership in the union, which fact, if revealed, would lead to their discharge. Thus, the judges of a great tribunal indicate their conviction that when dealing with legal problems enmeshed in dynamic social forces, courts ought to decide only the case before them and to remain open to all the wisdom the future may hold.[198]

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[187] *Ibid.* 78.

[188] *Ibid.* 79.

[189] *Ibid.* 80.

[190] "Both parties have upon this appeal cited decisions, most of them from other jurisdictions, which they urge support certain of their contentions. Some of the opinions in these cases are of great weight because of the strength of the reasoning and the authority of the tribunals. The law that should be applied in this jurisdiction to the circumstances disclosed by the record has been established by repeated decisions of this court. Difficulty, if any, lies in the application of established rules of law to particular facts. Attempt by analysis to reconcile or distinguish decisions where other courts have passed upon a state of facts in which analogy is more or less complete would be futile. It might even tend to confusion or deduction of rules which are rigid or arbitrary." *Ibid.* 82.

[191] *Ibid.* 75.

[192] *Ibid.* 78.

[193] *Ibid.* 79.

[194] *Ibid.* 81.

[195] *Ibid.* 82.

[196] *Ibid.* 79.

Finally must be considered the legal status of the boycott in American law. Like so many words in common usage, "boycott" carries the accretions of diverse meanings. It is a single term for various weapons in the modern industrial conflict, hence to the law it is a "word . . . of vague signification, and no accurate and exclusive definition. . . ."[199] Such immanent ambiguity and confusion in terminology inevitably yield conflicting decisions. Behind the same words lie different assumptions as to facts and different conceptions of policy. The so-called primary boycott, a mere withholding of patronage and refusal to trade, is unimportant, and its legality has rarely been questioned. The forms of pressure usually characterized as "the secondary boycott"—a combination to influence *A* by exerting some sort of economic or social pressure against persons [200] who deal with *A*—have been condemned by the federal and the Massachusetts courts in a series of instances revealing a great range of versatility. Whether the means of pressure upon a third person be a threat of strike against him,[201] a refusal to work on material of non-union manufacture,[202] an unfair list backed by the show of concerted action and force of numbers,[203] coercion and intimidating measures generally,[204] or merely notice by circularization, banners or publication [205]—the ban of illegality has fallen upon all alike.[206]

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[197] *Ibid.* 79.

[198] After the Lavin litigation had begun, the Interborough entered into new arrangements with its employees whereby they "agreed" to membership in the company union for a period of two years, and further "agreed" to abstain from membership in the Amalgamated. Against interferences with this arrangement as part of an effort to secure affiliation by the Interborough employees with the Amalgamated, the Interborough started a new suit to enjoin the President of the American Federation of Labor and others. At *nisi prius* an injunction *pendente lite* was denied, Interborough Rapid Transit Co. *v.* Green, 131 Misc. 682 (N. Y. 1928). The court, in a penetrating opinion by Wasservogel, J., reduced the agreement, nominally for a stipulated term of two years, to one merely at will since "unlimited and practically unhampered power to discharge employees is given to the company". The case, therefore, was in effect controlled by the Lavin Case: "Whatever the status of the contract at law, the provisions above referred to are, to say the least, inequitable. The term of the contract is, in effect, controlled by the will of the employer and plaintiff is, therefore, in no better position than it was in the *Lavin* case. Not only the employees, but also the third parties made defendants in this case may, in a court of equity, avail themselves of the defense interposed". at 687. No appeal was taken from this decision. See discussion of the case Carey and Oliphant, *Present Status of Hitchman Case* (1929) 29 Col. L. Rev. 441, 457.

[199] Hough, J., in Gill Engraving Co. *v.* Doerr, 214 Fed. 111, 118 (S. D. N. Y., 1914). The same judge said: "I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. . . . All are voluntary abstentions from acts which normal persons usually perform for mutual benefit; in all the reason for such abstention is a determination to conquer and attain desire by proving that the endurance of the attack will outlast the resistance of the defense . . ." at 119.

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[200] As to how far duress, as an element in boycott, is a tort in our law, see a note in (1925) 39 HARV. L. REV. 108.

[201] Hopkins *v.* Oxley Stave Co., 83 Fed. 912 (C. C. A. 8th, 1897); Reynolds *v.* Davis, 198 Mass. 294 (1908). But see Iron Molders Union *v.* Allis-Chalmers Co., 166 Fed. 45, 51 (C. C. A. 7th, 1908).

[202] Bedford Cut Stone Co. *et al.* *v.* Journeymen Stone Cutters' Assn. *et al.* 274 U. S. 37 (1927); Shine *et al.* *v.* Fox Bros. Mfg. Co., 156 Fed. 357 (C. C. A. 8th, 1907); Irving *et al.* *v.* Carpenters etc., 180 Fed 896 (S. D. N. Y., 1910; Burnham *v.* Dowd, 217 Mass. 351 (1914); New England Cement Gun Co. *v.* McGivern, 218 Mass. 198, 203 (1914); Harvey *v.* Chapman, 226 Mass. 191 (1917); Snow Iron Works *v.* Chadwick, 227 Mass. 382 (1917); A. T. Stearns Lumber Co. *v.* Howlett, 260 Mass. 45 (1927). A. T. Stearns Lumber Co. *v.* Howlett, 260 Mass. 45 (1927), appeal from final decree, judgment *aff'd,* 163 N. E. 193 (1928). See *Right of Union to Refuse to Work on Materials Produced or Transported by Nonunion Labor* (1928) 52 A. L. R. 1144.

[203] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 (1911); Seattle Brewing & Malting Co. *v.* Hansen, 144 Fed. 1011 (N. D. Cal. 1905); Rocky Mountain Bell Tel. Co. *v.* Montana Fed. of Labor, 156 Fed. 809 (D. Mont., 1907); Citizens' Light, H. & P. Co. *v.* Montgomery Light & Water Power Co., 171 Fed. 553, 557 (N. D. Ala., 1909); Reynolds *v.* Davis, 198 Mass. 294 (1908). In the Gompers Case, the Court offered this as the reason for its conclusion: ". . . the agreement to act in concert when the signal is published, gives the words 'Unfair', 'We don't patronize', or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have", at 439.

[204] Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135 (S. D. Ohio, 1891); Toledo A. A. & N. M. Ry. v. Pennsylvania Co., 54 Fed. 730 (N. D. Ohio, 1893); Hopkins *v.* Oxley Stave Co., 83 Fed. 912 (C. C. A. 8th, 1897). See Laidler, BOYCOTTS AND THE LABOR STRUGGLE (1914), 6 A. L. R. (1920) 909 *et seq.* for a representative collection of "boycott" decisions.

[205] Seattle Brewing Co. *v.* Hansen, 144 Fed. 1011 (N. D. Cal., 1905); Rocky Mountain Bell Tel. Co. *v.* Montana Federation of Labor, 156 Fed. 809 (D. Mont.,

Here again, New York has found this comprehensive condemnation [206] far too simple and has made discriminations. It has not put law against the exercise of the milder forms of "moral" coercion. Thus, banners and circularization inviting neutrals to "keep away" [207] or "not to patronize," [208] may be used; unions may solicit their "sympathizers and friends to withdraw their patronage or to refrain from patronizing the plaintiff" [209] who refuses to recognize them. Even more drastic economic pressure enjoys legal immunity in New York. An outside limit is drawn against union activity; it "cannot . . . extend beyond a point where its . . . direct interests cease." [210] But in its conception of what constitutes "direct interest", the New York Court of Appeals parts company with other courts. Mr. Justice Brandeis spoke only for a minority of the Supreme Court in recognizing that the concerted withdrawal of labor from materials of non-union origin is justified by appreciating "the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself." [211] In New York, this justification for economic pressure has found legal

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1907); *cf.* Citizens Light, H. & P. Co. *v.* Montgomery Light & Water Power Co., 171 Fed. 553, 557 (N. D. Ala., 1909); Sherry *v.* Perkins, 147 Mass. 212 (1888); Martineau *v.* Foley, 225 Mass. 107 (1916).

[206] Mr. (now Chief Justice) Taft, in an article appearing in McClure's Magazine, wrote: "A body of workmen are dissatisfied with the terms of employment. They seek to compel their employer to come to their terms by striking. They may legally do so. . . . But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him by threats that unless such third persons do so the workmen will inflict similar injury on such third persons, the combination is oppressive, involves duress, and if injury results, it is actionable." (1909) 33 McClure's Magazine 204. *Cf.*, however, the recent English decisions. Davis *v.* Thomas [1920] 1 Ch. 217; Ware & De Freville *v.* Motor Trade Assn. [1921] 3 K. B. 40; Sorrell *v.* Smith [1924] 1 Ch. 506.

[207] Foster *v.* Retail Clerks' Protective Assn., 39 Misc. 48 (1902).

[208] Sinsheimer *v.* United Garment Workers, 77 Hun 215 (N. Y., 1893); Butterick Publishing Co. *v.* Typographical Union, 50 Misc. 1 (1906).

[209] Heitkamper *v.* Hoffman, 99 Misc. 543, 548 (N. Y., 1917). See also People *v.* Radt *et al.* 15 N. Y. Cr. Rep. 174 (1900); Cohen *v.* United Garment Workers of America, 35 Misc. 748 (1901); Seubert, Inc. *v.* Reiff *et al.* 98 Misc. 402 (1917).

[210] Bossert *v.* Dhuy, 221 N. Y. 342, 365 (1917).

[211] Duplex Co. *v.* Deering, 254 U. S. 443, 482 (1920). But a late decision of a federal district court appears to apply the reasoning of Brandeis, J. In Aeolian Co. *v.* Fischer, 27 F. (2d) 560 (S. D. N. Y., 1928) injunctive relief was denied against a refusal to work upon non-union materials and with non-union men: "How far the members of a craft may go in their organized

recognition. A strike or threat to strike may be brought to bear upon neutrals, provided that the neutrals thus used as a lever are within the same industry as those in whose coercion the union is primarily interested.[212]

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capacity in refusing to work in the same building with non-union members of other crafts is a question not so simple of solution. It depends upon the extent to which those who co-operate have in point of fact a common interest, and are justified in what they do by honest motives to advance self-interest, as opposed to malicious intent to injure the business or good-will of another" (at 564). This decision was affirmed by the Circuit Court of Appeals for the 2d Circuit (Manton, Circ. J., dissenting) 29 F. (2d) 679 (1928), but upon the broad ground that the defendants' conduct was "such indirect interference with interstate commerce" as not to be "within the prohibition of the anti-trust act." *Cf.* the opinion of Judge Grubb in United States *v.* Journeymen Stone Cutters Ass'n (S. D. N. Y., 1927, unreported): "It may be said, and it is likely true, that economically and morally those motives or each of them were all right, and nobody could criticize the labor leaders for taking care of themselves. Self-preservation gives them that right. But so far as the economical and moral aspect of it is concerned, as I understand the decisions of the Supreme Court, this court can not consider them, because the unlawful conspiracy or unlawful restraint depends only upon an intent to interfere with the flow of interstate commerce by keeping these commodities out of the Metropolitan District, that were entitled to go there without that restraint. So, the motive, good or bad, does not make it any the less the duty of the Court to sustain the Government's case." (at 394) (We rely for the facts and for Judge Grubb's oral opinion upon the Transcript of Record on Appeal to the Supreme Court, Journeymen Stone Cutters Ass'n *v.* United States, dismissed for want of jurisdiction, 278 U. S. 566 (1928).)

[212] Mills *v.* United States Printing Co., 99 App. Div. 605 (N. Y., 1904); Searle Mfg. Co. *v.* Terry, 56 Misc. 265 (N. Y., 1905); Bossert *v.* Dhuy, 221 N. Y. 342 (1917) as limited by Auburn Draying Co. *v.* Wardell, 227 N. Y. 1 (1919); Reardon, Inc. *v.* Caton, 189 App. Div. 501 (N. Y., 1919).

"Thus is brought to the aid of Organ Workers' Local No. 9, in its effort to secure for its own membership the work of installing, maintaining, and repairing plaintiffs' organs, the power of numerous allied crafts who appear to have no interest in the controversy, except a general desire to promote the cause of union labor. How far unions in different crafts may go in combining to aid a given craft to strengthen its union, or, in other words, how closely allied in fact must crafts be to justify such cooperation, is a question upon which the state law does not appear to have been authoritatively declared. Auburn Draying Co. *v.* Wardell, 227 N. Y. 1 . . . held unlawful a boycott against a trucking company which would not operate upon a closed union shop basis. There the defendants not only refused to deal with plaintiff, but also influenced tradesmen and other customers not to do so. Whether their conduct would have been lawful, if they had influenced only members of labor unions is by no means clear. See Nat. Protective Ass'n *v.* Cumming, 170 N. Y. 315 . . . and compare Curren *v.* Galen, 152 N. Y. 33 . . . Jacobs *v.* Cohen, 183 N. Y. 207, 212 . . . McCord *v.* Thompson-Starret Co., 129 N. Y., App. Div. 130. . . ." Aeolian Co. *v.* Fischer, 29 F. (2d) 679, 681 (C. C. A. 2nd, 1928).

Pierce *v.* Stablemen's Union, 156 Cal. 70, 76 (1909); Cohn & Roth Electric

In dealing with these lively issues, sterility and unconscious partisanship readily assume the subtle guise of "legal principles". The New York Court of Appeals is patently sensitive to this danger and alert to achieve a close correspondence between law and reality.

Co. *v.* Bricklayers Union, 92 Conn. 161 (1917); George J. Grant Const. Co. *v.* St. Paul Bldg. Trades Council, 136 Minn. 167 (1917); State *v.* Van Pelt. 136 N. Car. 633 (1904); and see Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45, 51 (C. C. A. 7th, 1908) where the court, after holding that it was not unlawful for the union to instigate strikes of iron molders in other iron foundries which were doing the plaintiff's work, said: "On the other hand . . . employees, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business."

CHAPTER II

THE PROCEDURE AND PROOF UNDERLYING LABOR INJUNCTIONS

MAITLAND observed that equity fulfils the law. "We ought", he said, "to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code. . . ." [1] As to labor controversies during the last quarter century, equity in America has absorbed the law. The equitable glosses have rewritten the American code of industrial conflict.

In its primitive stages, the injunction was chancery's device for avoiding the threat or continuance of an irreparable injury to land. As time went on, it was found serviceable for other, newly acquired concerns of a growingly heterogeneous society. But legal tradition fosters the illusion that law always was what it has come to be. And so, the chancellor brought under the concept of property whatever interests he protected.[2] Modern issues due to new complexities are thus smothered beneath the delusive simplicity of old terms. Our Supreme Court has said: "Plaintiff's business is a property right." [3] This is, indeed, indisputable, if intended merely as an assertion that certain advantageous relationships and the privilege of pursuing them are pecuniarily as valuable as a strip of Blackacre. But there is property and property, and legal remedies appropriate to the protection of Blackacre may not be applicable in gross to the protection of "business". Mr. Justice Holmes has exposed the question-begging process of arguing to concrete results from the generic concept of "property" as something of value. "By calling a business 'property' you make it seem like land . . . But you cannot give it definiteness of contour by calling it a thing."[4] Yet the term "property" has been the lattice-work upon which the labor injunction has climbed.[5] Naturally enough, but naïvely, American labor leaders have come to believe that the tropical growth of the injunction may be pruned away by artificially confining the notion to property.[6]

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[1] F. W. MAITLAND, LECTURES ON EQUITY (1909) 18.

[2] See Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640.

[3] Truax *v.* Corrigan, 257 U. S. 312, 327 (1921). In this case both the majority and the minority of the court built on the same formula, but reached opposite conclusions. See Mr. Justice Pitney's dissent, *ibid.* pp. 347-48. The other outstanding examples of recent years in the Supreme Court are Gompers *v.* Bucks Stove and Range Co., 221 U. S. 418 (1911); Hitchman Coal and Coke Co. *v.* Mitchell, 245 U. S. 229 (1917); International News Service *v.* Associated Press, 248 U. S. 215 (1918), *aff'g* 245 Fed. 244 (C. C. A. 2d, 1917); Duplex Co. *v.* Deering, 254 U. S. 443, 465 (1921). The Supreme Court said in the International News Service Case (at 236): "The rule that a court of equity concerns itself only in the protection of property rights treats any civil rights of a pecuniary nature as a property right . . . and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

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[4] Truax *v.* Corrigan, 257 U. S. 312, 342 (1921).

[5] See, *e.g.*, the testimony of Mr. S. S. Gregory, former President of the American Bar Association, testifying before the Commission on Industrial Relations: "These injunctions are based upon the theory that the man carrying on a business has a certain sort of property right in the good will or the successful conduct of that business; and that when several hundred or several thousand excited men gather around his premises, where he carries his business on, and threaten everybody that comes in there to work, and possibly use violence, that that is such an unlawful interference of property right as may be the subject of protection in equity. And that view of the law has been sustained by the courts of practically all the States." FINAL REPORT AND TESTIMONY SUBMITTED TO CONGRESS BY THE COMMISSION ON INDUSTRIAL RELATIONS, vol. 11, pp. 10538-39 (1915).

[6] See the proposal of S. 1482, 70th Cong. 1st Sess. 1928: "Equity courts shall have jurisdiction to protect property when there is no remedy at law; for the purpose of determining such jurisdiction, nothing shall be held to be property unless it is tangible and transferable. . . ." See Hearings before Subcommittee of the Senate Committee on the Judiciary, on S. 1482, 70th Cong. 1st Sess. (February 8 to March 22, 1928) especially pp. 144-48. The purpose of the bill was thus expounded by its chief sponsor, Andrew Furuseth, President of the International Seamen's Union of America (p. 147): "The meat of this bill is on the question of what constitutes property. An equity court can not deal with anything else, as we have it, and in order to deal with it in that way, in order to get jurisdiction at all we had to extend the meaning . . . of property. . . . Has Congress the power to redefine the meaning of the word 'property' and bring it back to where it was . . . we believe it has . . . and this bill will effect the purpose." For a criticism of this bill see (1928) 54 New Republic 7.

An earlier attempt at similar legislation is H. R. 94, 60th Cong. 1st Sess. See Hearings of House of Representatives Judiciary Committee, Injunctions, 62nd Cong. 2nd Sess. Jan. and Feb. 1912; Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 1482, 70th Cong. 1st Sess., pp. 424-34.

In Massachusetts (Mass. Acts, 1914, c. 778, § 2) a statute providing: "the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation for employer and employee, and to perform and carry on business in such relation . . . shall be held and construed to be a personal and not a property right," was held unconstitutional in Bogni *v.* Perotti, The manner in which the labor injunction has been invoked, and the uses to which it has been put show the precepts of law in action. Only a massing of detail, however summary, will reveal the pervading operations of the decree of equity in the arena of American industry.

Of the reported cases in the federal courts since 1901, there are one hundred and eighteen applications for injunctive relief, of which one hundred were successful.[7] But this affords no index of the extent of such equitable intervention. For only decrees that are challenged by motions for discontinuance, on appeal or through contempt proceedings, normally find their way into the reports. An independent search of the files of the eighty odd district courts in the federal system would alone furnish a complete table of cases in which injunction orders were issued.[8] We

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224 Mass. 152 (1916); see a pamphlet DAVENPORT, ANALYSIS OF THE MASSACHUSETTS DECISION DECLARING THE ANTI-INJUNCTION LAW UNCONSTITUTIONAL (1916) published by the American Anti-Boycott Association. See Chapters IV and V of this volume for further discussion.

[7] The data concerning federal cases referred to throughout the text are assembled in Appendices I and II.

We find twelve cases of inferior federal courts reported from 1894 to 1901, as follows: Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 60 Fed. 803 (E. D. Wis., 1894), *rev'd* in part, 63 Fed. 310 (C. C. A. 7th, 1894); Southern California Ry. Co. *v.* Rutherford, 62 Fed. 796 (S. D. Cal.. 1894); Thomas *v.* Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (S. D. Ohio, 1894); United States *v.* Elliott, 62 Fed. 801 (E. D. Mo., 1894); United States *v.* Debs, 64 Fed. 724 (N. D. Ill., 1894); Oxley Stave Co. *v.* Coopers' International Union, 72 Fed. 695 (D. Kan., 1896); Elder *v.* Whitesides, 72 Fed. 724 (E. D. La., 1895); Consolidated Steel & Wire Co. *v.* Murray, 80 Fed. 811 (N. D. Ohio, 1897); Mackall *v.* Ratchford, 82 Fed. 41 (D. W. Va., 1897); American Steel & Wire Co. *v.* Wire Drawers', etc., Union, 90 Fed. 608 (N. D. Ohio, 1898); United States *v.* Sweeney, 95 Fed. 434 (W. D. Ark., 1890); *In re* Reese, 98 Fed. 984 (D. Kan., 1900).

[8] Until a reliable system of American judicial statistics is established, the task of inquiry herein suggested is prohibitive. For a limited endeavor towards knowledge, we are indebted to former Senator George Wharton Pepper, one of the leaders of the American bar: "I was led recently to make such a review of our industrial history by my desire to account for the growing bitterness of organized labor toward the federal courts. . . . I accordingly addressed a letter to every United States district attorney asking him to secure from the clerk's office in his district a copy of all such injunction orders made by the United States Court in his district during the last few years." Pepper, *Injunctions in Labor Disputes* (1924) 49 A. B. A. REP. 174, 176.

"It is true that few injunction cases involving labor disputes are reported. The first act of the judge is as destructive to the strike as would be a volley of musketry with its incidental carnage.

"What becomes of the complaint or affidavits? It is a subject that some com-know enough to know that the unreported proceedings must be voluminous. Of fifteen injunctions issued during the Pullman strike in 1894, ten were never reported; eight of nine decrees in the Chicago Teamsters' strike; ten of eleven evoked by the Illinois Central strike. An investigation for the United States Commission on Industrial Relations in 1915 disclosed "one hundred and sixteen unreported federal injunctions."[9] In the course of very recent testimony before a Senate Committee, the President of the American Federation of Labor submitted his "partial list of injunctions" (including state as well as federal) to the number of three hundred and eighty-nine,[10] the great preponderance of which was issued within the last decade and remains unreported.

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mittee ought to investigate. As a rule the complaint disappears immediately. The clerks are usually very accommodating to the attorneys for big employers of labor; besides, in some jurisdictions, the attorneys are allowed to retain the original papers." T. C. Spelling, Senate Hearings on H. R. 23635, 62nd Cong. 2nd Sess., p. 998, and see p. 1027.

[9] A Commission on Industrial Relations was created by Act of Congress of August 23, 1912, to "inquire into the general conditions of labor in the principal industries of the United States. . . ." Dr. Edwin E. Witte, now chief of the Legislative Reference Department of Wisconsin, was designated by the Commission to report upon the use of the injunctions in labor disputes. Much of the material upon which Dr. Witte's report was based is unpublished; but he has very kindly made it available to us. Hereafter we shall refer to Dr. Witte's material as Witte, Industrial Comm. Appendix B (1915).

Writing in 1914 Dr. Witte knew "of 61 injunctions issued in connection with labor disputes which figured in reported federal decisions." He had "definite information as to the issuance of 116 unreported federal injunctions." Witte, Industrial Comm. Appendix B (1915) p. 9. These figures are only approximations. Dr. Witte made independent search through the files of daily newspapers in the larger industrial centers. For practically every month during the first half of the last decade he found additional unreported injunctions, *ibid.* p. 12.

[10] Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1482, 70th Cong. 1st Sess. Feb. 1928, pp. 77-86. Mr. Green classified the cases with respect to the trades or industries involved. Thus: bakers, 1 injunction; boot and shoe makers, 3; brewery workers, 1; bricklayer, 1; iron workers, 3; building service employees, 1; carpenters, 7; cigar makers, 2; retail clerks, 1; electrical workers, 6; foundry workers, 1; garment workers, 14; glass workers, 2; hod carriers, 3; hotel and restaurant employees, 44; jewelry workers, 1; laundry workers, 1; longshoremen, 1; machinists, 3; marble workers, 1; sheet metal workers, 2; mine workers, 29; moulders, 87; meat-cutters, 1; musicians, 2; painters, 6; pattern makers, 1; plasterers, 3; polishers, 2; potters, 1; paper-mill workers, 1; railway employees, 11; stage workers, 3; printing, 1; upholstering 11; stone-cutters, 3; stove-mounters, 1; teamsters, 6; textile workers, 4; neckwear makers, 1; cleaners, 1; building-trades department, 7; hat makers, 7; miscellaneous, 3; International Association Machinists, 99.

The official decisions of the inferior courts of New York[11] report only fifteen labor litigations for the quinquennium 1923-1927, but the New York Law Journal, the reporting organ for courts of first instance in New York City, lists for that city alone, during the same period, forty-eight additional opinions in injunction proceedings. The further number of injunctions granted or continued without opinion and left undisclosed by the entries "So Ordered" or "Order Continued", remains unascertained. Thanks to its Bureau of Statistics,[12] Massachusetts furnishes a surer measurement of the resort to equity in labor controversies. More than two hundred and sixty cases[13] have been assembled by that Bureau for the period between 1898 and 1916; of these only eighteen appear in the official law reports.

So long as this discrepancy persists between the courts' doings and a record of the courts' doings, misunderstanding is bound to be rife concerning the problems raised by the extensive use of the labor injunction. Thus, in the course of a recent hearing before a Senate Committee,[14] upon a bill to restrict the powers of the federal courts, counsel for an important association of manufacturers testified that "A study of the cases reported in the Federal Reporter . . . covering the period from January 1, 1903 to January 1, 1927 . . . discloses that the approximate number of injunctions issued during that time in the Federal courts in all classes of cases, show 968, of which 71 were issued in cases arising out of labor disputes. . . ."[15] Yet inquiry by ex-Senator George Wharton Pepper showed that during the Railway Shopmen's strike of 1922 "nearly everyone of the 261 'Class 1' railroads and a number of short-line railroads applied for injunctions in the various federal courts. No applications were denied. In all nearly 300 were issued."[16] Of these only twelve are reported officially.[17]

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[11] The New York data referred to throughout the text are assembled in Appendices III A and III B.

[12] MASSACHUSETTS LABOR BULLETIN, BUREAU OF STATISTICS, No. 70 (covering cases from 1898 to 1908); No. 78 (covering cases from 1908 to 1910); No. 117 (covering cases from 1910 to 1916). The series is entitled LABOR INJUNCTIONS IN MASSACHUSETTS.

[13] Even this is probably not the whole of the story. Dr. Witte writes: "It is doubtful whether for the first few years of this period [1898-1908] all injunctions issued by Massachusetts courts in labor disputes are included in this list." He relies on two items of evidence: (1) omission of the injunction in Kidder Press Co. *v.* Machinists' Union Lodge, No. 264, Judge Shelton, Suffolk County, July 6, 1899, reported in the *Machinists' Journal*, Aug., 1899, p. 464; *Boston Evening Transcript*, July 7, 1899; *Boston Globe*, July 7, 1899. (2) "The Committee on 'Relations between Employers and Employees,' which made a report to the General Court [the Massachusetts Legislature] in Jan., 1904, stated that 57 injunctions had been issued by Massachusetts courts in connection with labor disputes in the six years 1897-1902. Labor Bulletin No. 70 lists only 29 injunction actions in the five years 1898-1902, and only one for 1898." Witte, Industrial Comm., Appendix B (1915) p. 5.

[14] Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1482, 70th Cong. 1st Sess. Feb. 8 to March 22, 1928.

In truth, the extraordinary remedy of injunction has become the ordinary legal remedy, almost the sole remedy. Controversy over its exercise has long "overshadowed in bitterness the question of the relative substantive rights of the parties."[18] In the administration of justice between employer and employee, it has become the central lever. Organized labor views all law with resentment because of the injunction,[19] and the hostility which it has engendered has created a political problem of proportions.[20] The injunction is America's distinctive contribution in the application of law to industrial strife.

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[15] *Ibid.* p. 505; and see *ibid.* pp. 507-511. For testimony of the same sort at previous hearings, see Hearings before a Subcommittee of the Senate Committee on the Judiciary, June 13, 1912, on H. R. 23635, 62nd Cong. 1st Sess. p. 667; House Hearings on Clayton Bill in 1912, 62nd Cong. 2nd Sess. p. 336.

[16] George Wharton Pepper, *op. cit.* (1924) 49 A. B. A. REP. at 177.

[17] Some of these reports are of contempt proceedings which only incidentally refer to the proceedings in which the injunction was granted, there being no other report of the application for the injunction.

[18] Mr. Justice Brandeis (dissenting) in Truax *v.* Corrigan, 257 U. S. 312, 354, 366 (1921).

[19] See the address of President Green of the American Federation of Labor before the Chicago Bar Association on Jan. 13, 1928, reprinted in 69 CONG. REC. 1846 *et seq.* (1928). He speaks of labor's "deep sense of wrong and injustice." In the same vein are the remarks of Vice-President Matthew Woll of the American Federation of Labor: "Leaving aside the legal technicalities involved, the economic and human factors of the case are of the greatest importance. It is just as well that this question be fought out now and definitely, so that we may know whether we have a democracy in this country or whether we are to live under corporate domination, whether our industrial relations are to be determined by free and voluntary cooperation or by judicially enforced corporate tyranny." *N. Y. Times,* Nov. 8. 1927, p. 39, col. 1. Again, Mr. Woll: "Each and all of these injunctions seriously affected some phase of labor's activities, and all of them tended to restrict and limit the peaceful, normal and necessary activities of labor. . . . No other country in the world permits its laborers to be harassed and oppressed by the use of injunctions in labor disputes. In order to maintain our American standard of living and the morale and spirit and patriotic fervor of the American workers, we must abolish and wipe out this iniquitous menace which threatens to undermine our industrial supremacy and establish class distinction and class hatred." *N. Y. Times,* Feb. 8, 1928, p. 27, col. 8.

INJUNCTION PROCEDURE

In nearly all American jurisdictions, certainly in the three under detailed scrutiny, injunctive writs [21] are of three general

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According to the INTERCHURCH REPORT ON THE STEEL STRIKE OF 1919, "the feeling of the steel workers might be summed up thus: That local and national government not only was not their government (*i.e.* in their behalf) but was government in behalf of the interests opposing theirs; that in strike times government activities tended to break strikes". (at 242)

And see FINAL REPORT OF THE (U. S.) COMMISSION ON INDUSTRIAL RELATIONS (1915) pp. 61-64; FINAL REPORT OF THE (U. S.) INDUSTRIAL COMMISSION (1902); (1900) 7 AMERICAN FEDERATIONIST, 350; (1902) 9 *ibid.* 685; (1908) 15 *ibid.* 976.

Samuel Gompers in Senate hearings on H. R. 23635, 62nd Cong., 2d Sess., Jan. 6, 1913—after quoting the following from the judge who tried the MacNamara Case—"The evidence in this case will convince any impartial person that government by injunction is infinitely to be preferred to government by dynamite".—said: "If ever the time shall come (and let us hope and work that it never shall come) when government by dynamite shall be attempted it will have as its main cause the theory and policy upon which is based government by injunction—personal government foisted upon our people instead of a government by law." (at 1071)

[20] The most recent fruit of the controversy is the investigation by the Senate Committee on Interstate Commerce of the causes and conduct of the bituminous coal strike. (Hearings on Conditions in the Coal Fields of Pennsylvania, West Virginia and Ohio.) The resolution of Senator Johnson of California (S. Res. 105) authorizing the investigation states especially: ". . . in this connection the said committee or subcommittee thereof, shall ascertain whether in industrial disputes or strikes in said coal fields injunctions have been issued in violation of constitutional rights, and whether by injunction or otherwise the rights granted by the Constitution of the United States have been abrogated and denied." 69 CONG. REC. 3097 (1928). In presenting the case of the striking bituminous miners at the opening of the investigation, the president of the United Mine Workers of America, John L. Lewis, proposed a governmental program for alleviation of conditions existing in the soft coal fields of Pennsylvania, West Virginia and Ohio. The first item on that program was: "1. That Congress take steps to correct alleged 'abuses' in the issuance of injunctions in the Federal Courts in labor disputes." *U. S. Daily*, March 8, 1928, p. 1, col. 1.

A résumé of the numerous bills introduced in Congress prior to the Clayton Act of 1914 is given by Mr. Justice Brandeis in his dissenting opinion in Truax *v.* Corrigan, 257 U. S. 312, 369-70, nn. 38, 39. The learned Justice adds: "These legislative proposals occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914. Reports recommending such legislation were repeatedly made by the Judiciary Committee of the House or that of the Senate; and at some sessions by both." See Chapter IV.

[21] In New York, the writ of injunction has been abolished; a temporary injunc-

classes:[22] first, the temporary restraining order or injunction *ad interim,* which in ordinary course issues *ex parte,* without notice or hearing; second, the temporary injunction or injunction *pendente lite,* issuing after notice and opportunity to be heard; third, the permanent injunction, based on a full hearing and enforcing the final decision on the merits.[23] Hearings on motions to continue or dissolve a restraining order or temporary injunction are intervening stages in this process.

A complaint (bill in equity) starts the machinery. Besides the unlawful interference or threatened[24] interference with some right of the plaintiff, the complaint relies on one or more of the recognized formulas for equitable jurisdiction—that the damage will be irreparable,[25] that the remedy at law is inadequate,[26] that the interference threatens to continue,[27] or involves multiplicity of actions.[28] This is sworn to by the plaintiff of his own

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tion is granted by order. N. Y. Civil Practice Act (1921), Article 51, § 876. In the federal courts the writ still prevails, 28 U. S. C. § 378.

[22] The practice in the federal courts is governed by §§ 381-383 of 28 U. S. C., (Clayton Act, § 17, Oct. 15, 1914, 38 STAT. 737). For Massachusetts, Gen. L. c. 214, § 9 (1921); Rules of the Supreme Judicial Court of Massachusetts for the Regulation of Practice in Equity, Nos. 2 and 28, 1926. For New York, Civil Practice Act (1921) §§ 877, 878, 882.

[23] A restraining order performs the function of order, process and notice. But the writ of injunction, when temporary, is preceded by the entry of an order, and where permanent, by the entry of a decree.

[24] See Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229 (1917); Walton Lunch Co. *v.* Kearney, 236 Mass. 310 (1920); Hotel & Railroad News Co. *v.* Clark, 243 Mass. 317 (1922); Schwarcz *v.* International L. G. W. Union, 68 Misc. 528 (N. Y. 1910); Grassi Contracting Co. *v.* Bennett, 174 App. Div. 244 (N. Y., 1916).

[25] Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M, 283 Fed. 557 (D. Mont. 1922); Burgess Bros. Co., Inc. *v.* Stewart, 112 Misc. 347 (N. Y., 1920).

[26] Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901). See Judicial Code, § 267, 36 STAT. 1163, 28 U. S. C. § 384: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

[27] Russell & Sons *v.* Stampers & G. L. L. U. No. 22, 57 Misc. 96 (N. Y., 1907); Exchange Bakery & Restaurant Inc. *v.* Rifkin, 245 N. Y. 260 (1927).

[28] Blindell *v.* Hagan, 54 Fed. 40 (E. D. La., 1893), *aff'd* 56 Fed. 696 (C. C. A. 5th, 1893); Buyer *v.* Guillan, 271 Fed. 65 (C. C. A. 2nd, 1921); Davis *v.* Zimmerman, 91 Hun. 489 (N. Y., 1895). Additional grounds for equity jurisdiction sometimes employed are the difficulty of ascertaining damages and the pecuniary irresponsibility of defendants. See Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1919), *aff'd* Quinlivan *v.* Dail-Overland Co., 274 Fed. 56 (C. C. A. 6th, 1921).

knowledge or to the best of his information and belief, buttressed at times by affidavits of witnesses.[29] The complaint is accompanied either by a notice to the defendant that a motion for a preliminary injunction will be made to the court at a stated time, or by a court order requiring defendants to appear on a set date and show cause why a temporary injunction should not issue, restraining them from pursuing the conduct alleged until a final determination upon the merits.[30] If, however, the complaint indicates that the danger of irreparable injury is too imminent to risk delay, a temporary restraining order may issue forthwith until a hearing can be had.[31] The first hearing is not final; it is intended merely to enable the judge to estimate the probabilities of the situation.[32] Proof is made by affidavits from both sides. Before final disposition, the testimony of witnesses is rarely invoked.[33] At all hearings, preliminary and final, the judge determines the facts without a jury; the constitutional guarantee of trial by jury does not extend to suits in equity.[34] Interlocutory orders may be tested by direct appeal,[35] or collaterally by an appeal from a conviction for contempt.[36] On direct appeal, abuse of discretion alone is reviewed; [37] while in proceedings for contempt only the court's power in issuing the injunction may be challenged.[38] Proceedings in contempt of the injunction are had before the judge who granted the decree,[39] again without a jury to pass on the evi-

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[29] The injunction is based upon the complaint alone; and if that is insufficient, affidavits, though they supply the defects in the complaint, will not help. N. & R. Theaters, Inc. *v.* Basson, 127 Misc. 271 (N. Y. 1925); N. Y. Civil Practice Act (1921) § 877.

[30] In Massachusetts, a subpoena issues from the court immediately upon the filing of the bill of complaint for service upon the persons named as defendants. See Rules of the Supreme Judicial Court of Massachusetts for the Regulation of Practice in Equity, No. 1 (1926).

[31] See *e.g.*, Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760 (C. C. A. 5th, 1903); Pack *v.* Carter, 223 Fed. 638 (C. C. A. 9th, 1915).

[32] Goldfield Consol. Mines Co. *v.* Goldfield M. U. No. 220, 159 Fed. 500 (D. Nev., 1908); N. Y. Cent. Iron Works *v.* Brennan, 105 N. Y. Supp. 865 (1907); Skolny *v.* Hillman, 114 Misc. 571 (N. Y., 1921).

[33] The old Rule 67, whereby testimony was taken by deposition in the Federal Courts, was abolished by Rule 46 of the New Federal Equity Rules (see 226 U. S. 661). Now "In all trials in equity the testimony of witnesses shall be taken orally in open court. . . ." See Lane, *Federal Equity Rules* (1922), 35 HARV. L. REV. 276, 291; DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) § 173. This is an adoption of the English practice (Order XXXVII, Rules 5-25). As to exceptions, see Los Angeles Brush Corp. *v.* James, 272 U. S. 701 (1927).

[34] See United States Constitution Amendment VII. Liberty Oil Co. *v.* Condon National Bank, 260 U. S. 235 (1922); Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901); Union Pac. R. Co. *v.* Ruef, 120 Fed. 102 (D. Neb., 1902). Constitution of State of New York, Art. 1, § 2: "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever. . . ." See Lynch *v.* Metropolitan Electric Ry. Co., 129 N. Y. 274 (1891); Thompson *v.* The Erie Railroad Company, 45 N. Y. 468 (1871). The

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Massachusetts Constitution (Declaration of Rights, Art. 15) provides: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties shall have a right to a trial by jury . . ."

[35] See 36 Stat. 1134 (1911), 43 Stat. 937 (1925), 28 U. S. C., § 227. Before the enactment of section 7 of the Circuit Court of Appeals Act of March 3, 1891 (26 STAT. 828), there was no method of reviewing on appeal an interlocutory order or decree of the District or then existing Circuit Courts. See Lewis *v.* Hitchman Coal & Coke Co., 176 Fed. 549 (C. C. A. 4th, 1910). In Massachusetts, also, appeal may be had from an interlocutory decree; see (1921) Gen. L. c. 214, § 26. So in New York (1921), Civil Practice Act, § 622. An appeal does not suspend the operation of the injunction, see Notes in 38 L. R. A. (N. S.) 436; 14 L. R. A. (N. S.) 1150.

[36] See, *e.g., In re* Debs, Petitioner, 158 U. S. 564 (1894).

[37] Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56, 62 (C. C. A. 7th, 1921): "Because the bill states a good cause of action, and because the decree is merely interlocutory, nothing is now involved but the question whether the decree clearly discloses an improvident exercise of judicial discretion"; Kinloch Telephone Co. *v.* Local Union No. 2, 275 Fed. 241 (C. C. A. 8th, 1921), *certiorari* denied, 257 U. S. 662 (1922). An interesting demonstration of this point is supplied by Levy *v.* Rosenstein, 67 N. Y. Supp. 630 (1900), and Davis *v.* Rosenstein, 67 N. Y. Supp. 629 (1900). The same appellate court sustained in the first case the trial court's denial of an injunction, and the trial court's grant of the injunction in the second, though the facts were apparently alike in both cases. See also Meccano, Ltd. *v.* John Wanamaker, 253 U. S. 136, 141 (1920); Goldwyn Pictures Corporation *v.* Goldwyn, 296 Fed. 391 (C. C. A. 2nd, 1924).

[38] *In re* Debs, Petitioner, 158 U. S. 564 (1894); Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 450 (1911); Schwartz *v.* United States, 217 Fed. 866 (C. C. A. 4th, 1914). The distinction is one of great importance. See Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 106.

[39] "The essential act of contempt is the disrespect shown to the order of the court and the disobedience thereof." "It is the court whose judgment or order has been defied which must try the contempt and pronounce judgment." Dunham *v.* United States, 289 Fed. 376, 378 (C. C. A. 5th, 1923). That case held that § 53 of the Judicial Code, requiring that prosecution for crimes should be had within the division of the district where the same are committed, was inapplicable to the trial for contempt of a strike injunction. *Accord:* McCourtney *v.* United States, 291 Fed. 497 (C. C. A. 8th, 1923); Sullivan *et al. v.* United States, 4 F. (2d) 100 (C. C. A. 8th, 1925). This rule has not been changed because of the right to jury trial conferred by the Clayton Act, Myers *v.* United States, 264 U. S. 95 (1924). The practice now followed in New York state courts is to have the motion to adjudge in contempt heard and argued before the

dence,[40] frequently upon affidavits in lieu of testimony subjected

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judge who happens to preside over the motion term. He may or may not be the judge who granted the injunction.

[40] See Rutherford *v.* Holmes, 5 Hun. 317, 319 (N. Y., 1875), *aff'd* 66 N. Y. 368 (1876). See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924) 37 Harv. L. Rev. 1010; Sir John C. Fox, The History of Contempt of Court (1927); United States *v.* Sweeney, 95 Fed. 434 (W. D. Ark., 1899). This is the characteristic of the equity process that bears the brunt of labor's antagonism. In the Final Report of the Commission on Industrial Relations (created by the Act of Congress of Aug. 23, 1912) submitted in 1915, vol. 11, p. 10539, is found the testimony of Mr. S. S. Gregory, a former president of the American Bar Association, to this effect: "And that has been an injustice that has rankled in the minds of everybody that has been a victim of it, and justly so." Again, Judge Walter Clark, the Chief Justice of the Supreme Court of North Carolina, testified before the Commission (*ibid.* p. 53): "I do not think they [injunctions in labor disputes] can be justified, sir . . . [Their effect] has been, of course, to irritate the men, because they feel that in an Anglo-Saxon community every man has a right to a trial by jury, and that to take him up and compel him to be tried by a judge is not in accordance with the principles of equality, liberty, and justice.

Chairman Walsh. Do you think that has been one of the causes of social unrest in the United States?

Judge Clark. Yes, sir; and undoubtedly will be more so, unless it is remedied." §§ 21 and 22 of the Clayton Act (28 U. S. C. §§ 386, 387) give a right to trial by jury to persons charged with contempt in violating an injunction limited to situations where the conduct complained of is also a criminal offense. Michaelson *v.* United States, 266 U. S. 42 (1924). The story that weaves itself about these provisions is saved for Chapter IV. See the remarks of former Senator Pepper before the American Bar Association: "To the striker it seems like tyranny to find such vast power exercised—not by a jury of one's neighbors—but by a single official who is not elected but appointed, and that for life." Pepper, *op. cit.* (1924) 49 A. B. A. Rep. 174, 177. Before the Subcommittee of the Senate Judiciary Committee on S. 1482, *supra* note 6, an experienced lawyer testified: "Now, this contempt feature, of course, is the real power back of the injunctions because it is a power that is exercised by a single individual. There is no right to bail under many circumstances. There is no right to confront witnesses. There is no jury trial. Above all else, the person determining the contempt is the very person whose order has been disobeyed.

"That seems to me to be intrinsically an antisocial position for any man to be in. He lays down the order and naturally his pride is more hurt than anybody else on earth if his own order is disobeyed." (p. 159)

Judge Henry Clay Caldwell, at one time presiding judge of the Circuit Court of Appeals for the 8th Circuit, said in an address before the Missouri State Bar Association: "The modern writ of injunction is used for purposes which bear no more resemblance to the uses of the ancient writ of that name, than the milky way bears to the sun. Formerly it was used to conserve the property in dispute between private litigants, but in modern times it has taken the place of the police powers of the State and nation. It enforces and restrains with equal facility the criminal laws of the State and nation. With it the judge not only restrains and punishes the commission of crimes defined by statute, but he proceeds to frame a to cross-examination.[41] Punishment is at the discretion of the judge,[42] and has ranged from a substantial fine [43] to months in jail.[44] The formula of criminal procedure requiring proof of guilt

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criminal code of his own, as extended as he sees proper, by which various acts, innocent in law and morals, are made criminal; such as standing, walking, or marching on the public highway, or talking, speaking, or preaching, and other like acts. In proceedings for contempt for an alleged violation of the injunction the judge is the lawmaker, the injured party, the prosecutor, the judge and the jury. It is not surprising that uniting in himself all these characters he is commonly able to obtain a conviction. . . .

"The extent and use of this powerful writ finds its only limitation in that unknown quantity called judicial discretion, touching which Lord Camden, . . . said: 'The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst it is every crime, folly, and passion to which human nature is liable.'" *Trial by Judge and Jury* (1899) 33 AM. L. REV. 321, 327-28.

[41] See Garrigan *v.* United States, 163 Fed. 16 (C. C. A. 7th, 1908) where upon an appeal from a conviction which rested mainly upon affidavits the court said: ". . . those [affidavits] introduced for the prosecution and defense are 'directly contradictory' in all the facts bearing upon the issues involved. . . . Assuming, without deciding, that it was within the discretion of the trial court to hear the case upon such affidavits, instead of ascertaining the facts from testimony taken in open court, as was the course adopted in the Savin Case, 131 U. S. 267, 268 . . . and mentioned as of course in United States v. Shipp, 203 U. S. 563, 575 . . . the facts to authorize conviction must nevertheless be clearly established, and the affidavits introduced here exemplify the infirmity of such ex parte means for the 'legal understanding' of facts in controversy intended by the rules of evidence." (at 20)

[42] See Tinsley *v.* Anderson, 171 U. S. 101 (1898). So admission to bail is within judge's discretion. Matter of Vanderbilt, 4 Johns. Ch. 57 (N. Y., 1819); People *v.* Tefft, 3 Cow. 340 (N. Y., 1824). See Brandeis J., Truax *v.* Corrigan, 257 U. S. 312, 367 (1921). As to the power of the President to pardon for contempt of court, see *Ex parte* Grossman, 267 U. S. 87 (1925).

[43] See *e.g.*, United States *v.* Taliaferro, 290 Fed. 214 (W. D. Va., 1922); *aff'd* 290 Fed. 906 (C. C. A. 4th, 1923) (fine of $200).

[44] United States *v.* Debs, 64 Fed. 724 (N. D. Ill., 1894) (six months); Gompers *v.* Bucks' Stove & R. Co., 33 D. C. App. 516 (1909) (twelve, nine and six months to the respective contemnors); Oates *v.* United States, 223 Fed. 1013 (C. C. A. 4th, 1915), 233 Fed. 201 (C. C. A. 4th, 1916) (six months and costs to four contemnors); Reeder *v.* Morton-Gregson Co., 296 Fed. 785 (C. C. A. 8th, 1924) (sixty days). In New York punishment for a criminal contempt may be by fine not exceeding $250, or by imprisonment, not exceeding thirty days or both, "in the discretion of the court." Judiciary Law, § 751. But see Association of Dress Mfrs. *v.* Hyman, N. Y. L. J., Dec. 28, 1927, where the contemnors were fined "$10,000, the actual expense incurred through the institution of these proceedings." The court added: "This sum the defendants are directed to pay to the plaintiff or its attorney. In this amount there is not included the stenographer's expense for transcribing the testimony before the referee. They are further fined

beyond a reasonable doubt is adopted in such cases;[45] but on appeal the test of the validity of conviction is whether there was *any* evidence upon which to found it.[46]

This, briefly, is the mode by which labor injunctions are issued; and these, in part, are the procedural incidents. A contemnor of such an injunction and a criminal share much the same fate.

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the sum of $250, pursuant to section 773 of the Judiciary Law, to be collected and paid in like manner." (1928) 10 LAW AND LABOR 4. The Penal Law of New York, § 600, provides that criminal contempts are misdemeanors and punishable as such; a punishment under either law is not a bar to a proceeding under the other. People *v.* Meakim *et al.*, 133 N. Y. 214 (1892). So, in the federal courts, if a contempt is also a crime, conviction of one offense does not bar conviction for the other: Merchants' S. & G. Co. *v.* Board of Trade of Chicago, 201 Fed. 20, 27 (C. C. A. 8th, 1912); United States *v.* Colo., 216 Fed. 654 (W. D. Ark., 1914).

The Associated Press recently attributed the following announcement to Judge Hough of the United States Court (S. D. Ohio) concerning the enforcement of his decree in the unreported case of Clarkson Coal Mining Co. *v.* United Mine Workers: ". . . in the conference with the interested parties to the suit Judge Hough declared that he will see that any man not an American citizen who is convicted of violating the injunction is deported". *N. Y. Tribune,* Sept. 11, 1927, p. 6, col. 1. In this connection, note the testimony of Mr. Green, President of the American Federation of Labor, before the Senate Hearings on S. 1482, *supra* note 6: ". . . many of these foreign-speaking men who work in these mines and who are prohibited from serving as pickets have not yet acquired their citizenship, and there is always that constant fear in their hearts that they will be deported because of the violation of some law, that deportation proceedings will be instituted against them, so that they have great reverence for law, particularly while they are not citizens of our country. . . .

"And they are always afraid that they will be reported to the immigration officers, and these coal companies use that and use it most severely.

"'If you violate this order, if you violate this court order, we will report you to the immigration officers', and if there is anything that frightens the foreign-speaking man, it is that." (p. 71.)

[45] Garrigan *v.* United States, 163 Fed. 16 (C. C. A. 7th, 1908); Oates *v.* United States, 223 Fed. 1013 (C. C. A. 4th, 1915); 233 Fed. 201 (C. C. A. 4th, 1916). But see Matter of McCormick, 132 App. Div. 921 (N. Y. 1909).

So, too, the presumption of innocence and the privilege against self-incrimination are observed in a trial for criminal contempt. Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 444 (1911). See Michaelson *v.* United States, 266 U. S. 42, 66 (1924); *Ex parte* Grossman, 267 U. S. 87, 117 (1925); Root *v.* MacDonald, 260 Mass. 344 (1927).

[46] "To convict in a case of criminal contempt, the trial court must be convinced of the guilt of the accused beyond a reasonable doubt; but when there is evidence tending to show guilt the finding of fact by the District Court cannot be reviewed by this court. Bessette v. Conkey Co., 194 U. S. 338 . . . Schwartz v. United States, supra [217 Fed. 866]." Oates *v.* United States, 233 Fed. 201, 206 (C. C. A. 4th, 1916). *Cf.* Oriel *v.* Russell, 278 U. S. 358 (1929).

Few of the traditional safeguards against erroneous conviction that surround the criminal law are available in the chancellor's court.[47] From this it would not be unreasonable to infer that the temporary injunction founded alone on affidavits would be of infrequent occurrence, and that the *ex parte* restraint, issued without notice to defendants or opportunity for them to be heard, is a still rarer event in a court of equity. In Massachusetts, indeed, the *ex parte* order is unusual. Of the two hundred and sixty-five injunction suits in the inferior courts of that state between 1898 and 1916, only twenty-two were preceded by relief (called there "injunction *ad interim*").[48] In New York, decisions at *nisi prius* too infrequently set forth the record of litigation; but the Civil Practice Act of the State [49] authorizes the granting of *ex parte* orders and their continuance until hearing. In the federal courts, *ex parte* restraining orders play a vital part. Out of a total of one hundred and eighteen cases found in the official reports from 1901 to 1928, such restraining orders were granted in seventy cases and denied in one.[50] The preliminary injunctions are abundant in all three jurisdictions. The federal courts in twenty-seven years reported eighty-eight of them; New York, for the five-year period 1923-1927 reported forty-eight of them; Massachusetts for the period 1898-1916, one hundred and twenty-eight.[51]

The Bill of Complaint

Operating within the sphere of human conduct which is our present concern, the procedure outlined above has provoked major difficulties in four directions: first, the complaint; second, the quality of proof upon which injunctions are based; third, the scope of the injunction; fourth, the method of enforcing the injunction. The first two problems will be dealt with in the remainder of this chapter; consideration of the latter two is reserved for the next.

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[47] For an early criticism of the practice of enjoining criminal acts, see McMurtrie, *Equity Jurisdiction Applied to Crimes and Misdemeanors* (1892) 31 Amer. L. Reg. (N. S.) 1.

[48] See *supra*, note 12.

[49] § 882.

[50] See Appendices I and II. For the five-year period between 1910-1914, according to the report submitted to the United States Industrial Commission, in thirty-two injunction suits twenty-three *ex parte* orders were signed upon presentation of the bill of complaint and only three denied. Witte, Industrial Comm. (1915), Appendix B, pp. 30-31.

[51] See *supra* note 12.

The demarcation between permitted and forbidden activity is a process phrased in legal vernacular and executed through legal concepts. Enough has been said of the substantive law to indicate that adjudication in these matters means placing a case upon one side or the other of an elusive line. But the point of fixation in each instance involves predominantly a decision upon fact. Was there violence or is it threatened? Was there intimidation, or will there be? Was there coercion, or more than can be controlled by the policeman on the beat? Aside from the ambiguous meaning of loose concepts,[52] no matter what content one adopts, there is the initial question, did the requisite event occur? The stuff for decision of this pure issue of fact is found in complaint and supporting affidavits; later, upon preliminary hearings, there are counter-affidavits.

Speaking of bills in chancery of the fourteenth and fifteenth centuries, Professor Holdsworth engagingly remarks that "the litigants of this period never allowed the truth to stand in the way of the production of a picturesque effect." [53] In no class of modern litigation has this habit of picturesque portrayal survived so vigorously as in that which we are studying. All bills for equitable relief in labor disputes are cut according to the same master pattern. The complainant has property, business relations and contracts of great value, described with varying degrees of minuteness; to damage this business, the defendants have formed an unlawful conspiracy,[54] in pursuance of which they intend to strike, or have gone on strike, or are inducing others to go on strike, and have committed, or have caused to be committed acts of violence, intimidation and coercion—acts of violence sometimes specifically described, often alleged in general terms, or, lacking even that, threats of violence; [55] finally, allegations essential for equitable jurisdiction wind up the story —irreparable damage and inadequacy of the legal remedy. This is a bare skeleton, but the flesh it has taken on under American nourishment in three decades may, perhaps, be conveyed by contrasting an equitable complaint in a late nineteenth century labor controversy with one of recent years.

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[52] See *supra* Chapter I, pp. 34-35.

[53] 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 263 (1924).

[54] See *supra* Chapter I, p. 4.

[55] Pitney, J., in Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 256 (1917): "Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done."

The complaint filed by the Attorney General of the United States in the Pullman strike of 1894 (the *Debs Case*) [56] and that filed by his successor in the Railway Shopmen's Strike of 1922 will serve.[57]

The Debs complaint is directed against the American Railway Union, seventeen named individuals and "others whose names are not known"; it enumerates the roads affected by the strike, their mileage, the scope of their services in interstate commerce and in the carriage of the United States mails; it relates briefly the consequences attendant upon a general stoppage of the roads; it tells that a strike against the railroads was incidental to a "boycott" against Pullman cars, a conspiracy "with the intent and purpose of interfering with and restraining" regular transportation; and then—"in pursuance of said unlawful purpose and conspiracy," the defendants induced the employees to leave the service of the railroads; they asserted that they would paralyze every railroad that carried Pullman cars; they "did with force and violence at diverse times and places . . . stop, obstruct and derail and wreck the engines and trains of said railroad companies"; they have "by menaces, threats and intimidation, prevented the employment of other persons"; and finally: "Your orator is without relief in the premises save in a court of equity." The story is related in nine pages of a printed transcript of the record of the case, as submitted to the Supreme Court of the United States.

The bill filed by the government in the Shopmen's Strike in 1922 covers thirty-seven pages, exclusive of fourteen pages of prayers for relief and ninety-seven pages of exhibits. It enumerates as defendants seven associations, representative of their four hundred and one thousand members, and, by name, each of one hundred and twenty-two system federations of the Railway Employees' Department of the American Federation of Labor, likewise in their respective representative capacities; the importance of railroads in the national economy is dwelt upon, but at greater length; again, the strike is labelled, "conspiracy, combination, confederation, and agreement," but more repetitiously; the strikers are said to have conspired "unlawfully," etc., to prevent the railroads from hiring other workers and to induce those workers who remained to leave; then the familiar clauses "in pursuance of said unlawful conspiracy," etc., and "to accomplish the purposes thereof," followed by specifications of acts done; such acts were picketing "by importuning in a threatening, violent, and offensive manner and by opprobrious epithets and intimidation," accosting persons who desire to accept employment with "unfounded conversations and arguments, importuning, threats of violence, intimidation, and other forms of lawlessness." "In addition to all this, the vicious element of the striking employees" has created "a reign of terror by dynamiting railroad bridges," etc.; finally, the court was reminded that "the United States is without a remedy save in a court of equity." [58]

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[56] This bill is summarized in 158 U. S. 564, 566-70; but in the quotations which follow we have relied upon the official Transcript of the Record in the case.

[57] This bill is summarized in 283 Fed. 479, 481-84, but in the quotations from this bill which follow we have relied upon the official Bill of Complaint, as published by the Government Printing Office in 1922. This bill is also reprinted in 62 CONG. REC., 12097-12108 (1922).

We shall not weary the reader with samples of complaints used in New York [59] and Massachusetts.[60] Always and everywhere the badges of illegality are the same. They are transcribed almost verbatim from case to case. The allegations in a bill of equity which have proved sufficient to evoke injunction are as perfunctorily dictated as the statement of a cause of action for money had and received. Seldom, however, is judicial protest voiced against such practice.[61] But a Wisconsin case pierces to their significance the implications of this procedural abuse: "In such contests between employers and workmen there is frequent recourse to much strategy, and the law does not uphold that strategy on the part of the employer by which he seeks to obtain a blanket injunction upon a blanket complaint abounding in general conclusions but lacking in facts and circumstances. . . . A complaint in an action for an injunction . . . should be detailed, certain, and specific, giving facts and circumstances, including time and place of each alleged act of coercion, the name of the person coerced, if known, the manner in which he was coerced, and the manner in which and the extent to which it affected or impeded the employer's right to conduct his business in a lawful way." [62]

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[58] For the background of this bill, see APPENDIX TO THE REPORT OF THE ATTORNEY GENERAL, 1922; remarks in the United States Senate, 62 CONG. REC., 12,192 *et seq.* (1922). For a summary of newspaper comment, see LITERARY DIGEST, Sept. 16, 1922, pp. 7-9; Sternau, *The Railroad Strike Injunction* (1922) 12 AMER. LAB. LEG. REV. 157.

[59] Bills of complaint will be found summarized in the following cases: National Protective Assn. *v.* Cumming, 53 App. Div. 227, 228-29 (N. Y., 1900); Newton Co. *v.* Erickson, 70 Misc. 291, 292-93 (N. Y., 1911); Interborough Rapid Transit Co. *v.* Green, 131 Misc. 682, 683-85 (N. Y., 1928).

[60] For a collection of typical forms, see Massachusetts Labor Bulletin, No. 70, p. 99 *et seq.*; No. 117, p. 191. Typical cases are Vegelahn *v.* Guntner, 167 Mass. 92 (1896); Bogni *v.* Perotti, 224 Mass. 152 (1916).

Surely this is the counsel of wisdom. Of the one hundred and eighteen cases reported in the federal courts during the last twenty-seven years, not less than seventy *ex parte* restraining orders were granted without notice to the defendants or opportunity to be heard. In but twelve of these instances, was the bill of complaint accompanied by supporting affidavits; in the remaining fifty-eight cases, the court's interdict issued upon the mere submission of a bill expressing conventional formulas,[63] frequently even without a verification. Of the fifty-eight restraining orders so granted, twelve seem never to have come on for further hearing—even the very inadequate hearing incidental to the proceeding for a temporary injunction. This perfunctory technique carries its own comment. Of the restraining orders concerning which the time history is ascertainable through available court records, three were followed by temporary injunctions in substantially the same terms within five to ten days thereafter; fifteen were followed by temporary injunctions in substantially the same terms, one was modified and two were vacated within eleven to thirty days thereafter; eighteen were followed by temporary injunctions in substantially the same terms, three were modified and three vacated after more than a month, in some cases considerably longer after the issuance of the *ex parte* restraining order.[64] These figures bespeak the importance of exercising a critical judgment in the acceptance of partisan allegations, the more so because they flow from deep feeling. The dangers of irreparable injury to plaintiff by an erroneous denial of the immediate restraint must be balanced by the irreparable injury to striking laborers through an erroneous issuance of the order of restraint.[65] Highly colored affidavits by both parties to a bitter labor struggle, as we shall soon see, constitute a fragile enough basis for judicial decisions. An unsupported, one-sided complaint in general terms is an incantation, and not a rational solicitation for judgment.

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[61] See Davitt *v.* American Bakers' Union, 124 Cal. 99 (1899); Badger Brass Mfg. Co. *v.* Daly, 137 Wis. 601 (1909). See also Federal Equity Rule 73 (1912), providing that the cause must be set down for a hearing within ten days after the issuance of the restraining order; Judge Amidon in Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414 (D. N. Dak., 1923); Witte, Industrial Comm. Appendix B (1915), p. 37; House Report No. 612, 62d Cong. 2d Sess.

[62] Badger Brass Mfg. Co. *v.* Daly, 137 Wis. 601, 606 (1909).

[63] Witte, Industrial Comm. Appendix B. (1915), p. 30, cites twenty-nine other cases.

Defects in court procedure seldom find a place in a President's message to Congress upon "the State of the Union." But the abuses we have here described were flagrant enough for such attention. In a message to Congress, in 1909, President Taft proposed

> "a statute forbidding hereafter the issuing of any injunction or restraining order, whether temporary or permanent, by any Federal court, without previous notice and a reasonable opportunity to be heard on behalf of the parties to be enjoined; unless it shall appear to the satisfaction of the court that the delay necessary to give such notice and hearing would result in irreparable injury to the complainant and unless also the court shall from the evidence make a written finding, which shall be spread upon the court minutes, that immediate and irreparable injury is likely to ensue to the complainant, and shall define the injury, state why it is irreparable, and shall also endorse on the order issued the date and the hour of the issuance of the order. Moreover, every such injunction or restraining order issued without previous notice or opportunity by the defendant to be heard should by force of the statute expire and be of no effect after seven days from the issuance thereof

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[64] These figures are presented in Appendix II, as compiled from the data in Appendix I.

[65] This principle seems to be universally recognized in cases other than labor disputes. See *e.g.*, Sellers *v.* Parvis & Williams Co., 30 Fed. 164 (D. Del., 1886); Indianapolis Gas Co. *v.* City of Indianapolis, 82 Fed. 245 (D. Ind., 1897). Maloney *v.* Katzenstein, 135 App. Div. 224 (N. Y. 1909). And see 31 L. R. A. (N. S.) 881; COOK, CASES ON EQUITY (one volume ed. 1926), 327 *et seq.*

. . . unless within such seven days or such less period, the injunction or order is extended or renewed after previous notice and opportunity to be heard." [66]

The recommendation failed of action. Not until 1914, through the Clayton Act, was a remedy attempted.[67] Its aims and achievements form a large part of the legislative story of the labor injunction. Suffice it to say that the results are not unnaturally disheartening to those who regard legislation as an easy instrument of reform. On the other hand, Massachusetts, with similar legislation,[68] has practically eliminated *ex parte* orders upon a bill of complaint alone. The difference, one suspects, may lie in a difference in tradition between the United States and the Massachusetts courts. The latter have always been niggardly with temporary equitable relief.[69] In New York, legislation has often been mooted but never passed; in the last two sessions the State Legislature was vainly petitioned for relief.[70]

This much for the equity process where the remedy is based upon no evidence. The temporary injunction, or injunction *pendente lite,* which follows the restraining order, is based upon evidence. To an analysis of the nature of that evidence we now turn.

THE AFFIDAVITS

Upon filing of the bill of complaint, whether or not an *ad interim* restraining order is issued concurrently, the case is set down for preliminary hearing, normally within ten days.[71] At this preliminary hearing, usually reached after many postponements of the date originally set,[72] the defendants have the first opportunity to present their side of the story.[73] The complainant's prayer is for provisional relief pending a thorough trial of the merits. The issues before the judge are (1) whether, upon the evidence before him, he is reasonably satisfied that the complainants have made out a case of illegal damage, and (2) whether irreparable damage would result to the complainants if relief were withheld until final adjudication of the suit. The questions of fact underlying the decision of these issues are, first, were the acts of violence, intimidation, coercion, fraud, incitement actually committed, as alleged in the complaint; and, second, were the defendants responsible, through action or authorization or ratification, for any proved misconduct. The court's discretion "is of the broadest, and is seldom interfered with." [74] So long as the bill and answer and evidence before him present debatable questions, the judge may grant or withhold the preliminary injunction.[75] In the courts of the United States and of New York, evidence in the form of affidavits normally determines the exercise of this discretion.[76] In Massachusetts, applications for temporary injunction are usually referred to masters or judges of the Superior Court for extensive hearings and determination of the facts.[77]

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[66] First Annual Message, Dec. 7, 1909; 16 MESSAGES AND PAPERS OF THE PRESIDENTS, 7432.

[67] Act of Oct. 15, 1914, 38 STAT. 730; 28 U. S. C. § 381. For earlier attempts at such legislation in Congress, see Hearings before the Subcommittee of the Senate Committee on the Judiciary during the 60th, 61st and 62nd Congresses, Amendments to Sherman Antitrust Law and Related Matters, compiled for use in the consideration of H. R. 15657, 63rd Cong. 2nd Sess., and see Chapter IV.

[68] (1921) Gen. L. c. 214, § 9.

[69] See *supra,* note 12. The address of Gov. Allen to the Massachusetts General Court at the opening of the 1929 session contained this observation: "Fortunately, in this Commonwealth the practices of our courts have avoided many misuses of the injunction. Thus our courts, upon their own initiative, have generally refrained from issuing injunctions upon an *ex parte* hearing and without adequate investigation of the facts." Mass. Sen. Doc. No. 1, (1929) 28.

[70] Assembly Bill No. 113, referred to Committee on Judiciary (1928); Assembly Bill No. 399 (1928); Assembly Bill No. 915 (1928); Senate Bill No. 205, referred to Committee on Codes (1928); Assembly Bill No. 51 (1929).

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[71] Federal Equity Rule 73, 226 U. S. Appendix, p. 22 (1912); 28 U. S. C., § 381.

[72] Recent examples are Clarkson Coal Mining Co. *v.* United Mine Workers, unreported, but referred to in a subsequent stage of the litigation, 23 F. (2d) 208 (S. D. Ohio, 1927); New York, N. H. & H. R. Co. *v.* Railway Employees' Dept., 288 Fed. 588 (D. Conn., 1923); Staudte & Rueckoldt Mfg. Co. *v.* Carpenters' District Council, 12 F. (2d) 867 (C. C. A. 8th, 1926). "While in form, temporary, they have frequently amounted, in fact, to preliminary, and sometimes almost to permanent injunctions. This happened when the time fixed for the hearing of the motion for the preliminary injunction was long postponed. In such a case the restraining order might remain in force as long as it was of any substantial use to the plaintiff or of any practical injury to the defendant." ROSE, FEDERAL JURISDICTION AND PROCEDURE (3rd ed. 1926) § 572. The Senate Subcommittee on Interstate Commerce, in its investigation of the Pennsylvania coal strike, disclosed that an injunction issued six months previously remained effective during all that period without any hearing given to the strikers. See *N. Y. Times,* Feb. 28, 1928, p. 1, col. 6.

[73] Defendants may attack the restraining order sooner by a motion to dismiss the bill; but upon such a motion the complaint remains uncontroverted. ROSE, FEDERAL JURISDICTION AND PROCEDURE (3rd ed., 1926) § 546.

[74] See Ward *v.* Sweeney and others, 106 Wis. 44, 50 (1900) quoted in 4 POMEROY, EQUITY JURISPRUDENCE (1919) 3935.

[75] See *e.g.,* Decorative Stone Co. *v.* Building Trades Council, 13 F. (2d) 123 (C. C. A. 2d, 1926).

The method of proof—the court's source of knowledge of the critical facts in the case—is perhaps the chief source of discontent with equity's intervention in an industrial dispute. "The most serious complaint that can be made against injunctions, which have become so prominent a part of the law in dealing with strikes in the United States," according to Judge Amidon, "is the fact that courts have become accustomed to decide the most important questions of fact, often involving the citizen's liberty, upon this wholly untrustworthy class of proof."[78]

Concrete presentation of injunction suits will illustrate the difficulties inherent in the process of judgment in these cases. We shall take four typical examples from recent labor litigation in New York.[79]

Yablonowitz v. *Korn*[80] was an application for an injunction to restrain striking employees "from in any way molesting or interfering by picketing or otherwise, with the employees, customers or patrons of plaintiff." The questions of fact, whether the picketing was done in disorderly fashion, and whether the employees had been coerced into striking, were the crucial issues. The motion was supported by eighteen affidavits and opposed by ten. The substance of these affidavits is set out in the following parallel columns:

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[76] Dr. Witte reported to the United States Industrial Commission in 1915 that he knew "of no instance in which the witnesses were examined orally in court upon a hearing involving the issuance of a temporary injunction." Witte, Industrial Comm. Appendix B (1915), p. 47. Our own examination of the Federal Reporter, both prior and subsequent to that date, indicates only seven instances in which oral hearing was had. See also note in (1928) 41 HARV. L. REV. 909. We find no such instance in the New York reports.

[77] See *supra*, note 12.

[78] Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 416 (D. N. Dak., 1923). "Seldom can labor disputes wisely be decided upon affidavits and counter affidavits. On the present issues the law is too uncertain to be applied without full knowledge of the facts. The suit raises questions of importance to the public as well as to the parties, and should be awarded a final hearing promptly." Aeolian Co. *v.* Fischer, 29 F. (2d) 679, 681 (C. C. A. 2nd, 1928).

[79] The material that follows is in every instance taken from the transcript of the record of the case as it came before the Appellate Division of the New York Supreme Court.

[80] 205 App. Div. 440 (N. Y., 1923).

For the Injunction	*Against the Injunction*
1. The employees were compelled by intimidation and threats, used by the officers and agent of the defendant Union, to affiliate themselves with said Union. Four affidavits (one by a private detective and three by alleged customers of the complainant) repeated *in haec verba* what they alleged to be the language of one of these striking employees: "I would like to work for him (the complainant); he treated me very well, but what can I do with that bunch of bandits (the Union delegates), they will kill me; I have a wife and mother to support and the Union ordered me to sign up and go out and picket."	1. The affidavits of the Union organizers and of the Union secretary and treasurer stated: "It is wholly untrue. . . . They did so of their own volition." The affidavit of the striking employee whose language was quoted stated: "I never used such language and never entertained such a feeling to the Union. I became a member of the Union of my own free will and the language used is certainly not mine, but is an invention."
2. Affidavits of three customers stated: "they assaulted the complainant and called him vile names and likewise threatened a number of complainant's patrons with bodily harm if they continued to patronize him."	2. Denying affidavits of the Union officers and striking employees: "such statements are wholly untrue."
3. Affidavits of six alleged observers and two private detectives to the effect that the delegates from the Union used indecent language.	3. Affidavits of all of the named defendants in sweeping denial.
4. Complainant's affidavit stated: "They threatened that they would beat me up."	4. Affidavits of all of the named defendants: "the said statement is a wilful and malicious falsehood."
5. Affidavits of the complainant, of ten alleged observers, and,	5. Affidavits of all named defendants and six affidavits of

of two private detectives practically identical in terminology, as follows: "The defendants and numerous other pickets and delegates patrolled the front of the complainant's premises and blocked the entrance . . . made hostile demonstrations. . . ."	alleged observers practically identical in terminology as follows: "It is wholly untrue that large numbers of pickets are patrolling the plaintiff's shop. At the present time and for three weeks past there has been only one picket."

Upon these papers the judge of first instance was "in such grave doubt as to whether the defendants, or any of them, committed or are responsible for or in any manner encouraged the acts complained of" that he denied the application for relief.[81] His judgment was reversed by the Appellate Division, which, upon the same record, ordered an injunction.[82]

Two of our sample cases, *Altman* v. *Schlesinger*[83] and *Piermont* v. *Schlesinger,*[84] arose through the attempts of the International Ladies' Garment Workers' Union to unionize "open shops". In the *Piermont Case,* the motion for a temporary injunction was supported by seven affiants and opposed by nine; the motion in the *Altman Case* was supported by sixteen affiants and opposed by fourteen. Charges of "molesting, threatening, intimidating," and specific details of attacks upon some of the Piermont affiants were countered by officers of the National Union by denial of its responsibility for acts of a local union; officers of the local union denied "as wholly untrue that the Union, or any of its officers, had threatened the plaintiff with injury or had been a party to any act of disorder or any act of interference with the rights of the plaintiff"; each of the women pickets swore in substantially the following language: "I have at no time annoyed or molested any of the employees of the plaintiffs and would be unable to do so even had I wanted to as there are always policemen and guards in front of the door, who in every way care for the plaintiff's interests." This was the material upon which a temporary injunction issued.[85] In the *Altman Case,* also, affidavit was pitted against affidavit. Being unable to resolve the confusion, the court denied relief.[86] *Arnheim* v. *Hillman*[87] was an injunction proceeding against the Amalgamated Clothing Workers of America. Here, also, the crucial issue was as to the fact of violence. The array of affidavits mustered by both sides was unusually imposing; fifty-two for the complainant and fifty-four for the defendants. Each sworn allegation and every specific incident of disorder were controverted by detailed denial, sworn to with equal solemnity. A preliminary injunction *pendente lite* was denied at *nisi prius;*[88] on appeal an injunction was ordered.[89]

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[81] Opinion of Mr. Justice Giegerich, N. Y. L. J. Jan. 30, 1923, p. 1467.

[82] 205 App. Div. 440 (N. Y., 1923).

[83] 204 App. Div. 513 (N. Y., 1923).

[84] 196 App. Div. 658 (N. Y., 1921).

[85] Opinion of Mr. Justice McAvoy, reported in N. Y. L. J. Dec. 2, 1920, p. 740, col. 2; *rev'd* 196 App. Div. 658 (N. Y. 1921).

Similar illustrations might be taken from the federal courts. There, as in the New York courts, instances abound where the defendants' affidavits contradict all the plaintiff's assertions of misconduct.[90] The unvarying tenor and sameness of phrasing in affidavits submitted from case to case raise more than a suspicion that conformity to legal formula rather than accuracy of narrative guides oaths. The late Judge Hough revealed much in a parenthesis: "Defendant Brady has signed an affidavit (probably drawn after a perusal of reported cases). . . ."[91] Moreover, there is a professional affidavit-maker—the privately subsidized policeman,[92] the private detective, the "industrial spy."[93] The activity of these frequently employed adjuncts of American industry has thus been characterized by one of our wisest judges: "As a class they are overzealous, through their desire to prove to the detective bureaus that they are efficient, and to the railway company that they are indispensable."[94] Little known abroad, they have introduced into American industrial relations the most insidious and powerful forces of ill-will.[95]

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[86] ". . . the affidavits are so conflicting as to whether or not Yondelow was in any way connected with these acts of violence that this court will not on a motion direct a preliminary injunction." Mr. Justice Cohalan, in N. Y. L. J. June 22, 1922, p. 1086; *rev'd* 204 App. Div. 513 (N. Y. 1923).

[87] 198 App. Div. 88 (N. Y., 1921).

[88] By Mr. Justice McAvoy, without opinion.

[89] 198 App. Div. 88 (N. Y., 1921).

[90] See Note in (1928) 41 HARV. L. REV. 909.

[91] Gill Engraving Co. *v.* Doerr, 214 Fed. 111, 116 (S. D. N. Y., 1914). See also Judge Beatty: "There is a statement by one of the affiants in his affidavit on this point—I imagine suggested by counsel. . . ." Seattle Brewing & Malting Co. *v.* Hansen, 144 Fed. 1011, 1013 (N. D. Cal., 1905).

[92] UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS, FINAL REPORT (1915) c. IX, The Policing of Industry; *ibid.* Report on the Colorado Strike, G. P. West; c. III, Violence and Policing, c. IV, the Colorado Militia and the Strike.

Recently, a Subcommittee of the United States Senate Committee on Interstate Commerce, after investigating conditions in the Pennsylvania coal fields, reported as follows: "We took the evidence of a number of witnesses assembled there, all of whom told the same story about the rough treatment of the coal and iron police and some of them exhibited ugly scars that they will carry to the grave. . . .

"Everywhere your committee made an investigation in the Pittsburgh district we found coal and iron police and deputy sheriffs visible in great numbers.

It is, then, from an inspection of this "inanimate manuscript" and these "lifeless typewritten pages of conflicting evidence"[96]

In the Pittsburgh district your committee understands there are employed at the present time between 500 and 600 coal and iron police and deputy sheriffs. They are all very large men; most of them weighing from 200 to 250 pounds. They all are heavily armed and carry clubs designated as a 'blackjack.'

"Everywhere your committee visited they found victims of the coal and iron police who had been beaten up and were still carrying scars on their faces and heads from the rough treatment they had received. . . ." *U. S. Daily,* March 13, 1928, p. 12, col. 3. The full text of the report begins in the *U. S. Daily* for March 12, 1928, p. 5.

[93] HOWARD, THE LABOR SPY (1924); UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS, FINAL REPORT (1915), The National Erectors' Association, and the International Association of Bridge and Structural Ironworkers, by Luke Grant, c. 15, Spies in the Ironworkers' Union. See Hearings on S. 1482 (*supra,* note 6), pp. 129-30, 236, 278, 543, 564, with regard to the Indianapolis street car strike of 1926, where a "union leader" who advocated violence and contempt of the injunction was in fact an employee of the car company, carrying out its instruction. A striking instance is related in a New York case, Wood Mowing & Reaping M. Co. *v.* Toohey, 114 Misc. 185, 192-95 (N. Y., 1921).

[94] Judge Amidon in Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 416 (D. N. Dak. 1923). And so, also, Consolidated Steel & Wire Co. *v.* Murray, 80 Fed. 811, 815 (N. D. Ohio, 1897): "If the affiants are not foresworn, they are, to put the matter in the most charitable light, gifted with such facility for appealing from their knowledge to their ignorance as to be altogether unworthy of belief." The Supreme Court has lately expressed a like opinion: "All know that men who accept such employment [*i.e.* private detectives] commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges." per Mr. Justice McReynolds in Sinclair *v.* United States, 279 U. S. 749 (1929).

[95] See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924) 37 HARV. L. REV. 1010, 1053, and n. 159. See also POUND *et al.,* REPORT ON ILLEGAL PRACTICES OF DEPARTMENT OF JUSTICE (1920); INTERCHURCH REPORT ON STEEL STRIKES OF 1919, 221 *et seq.* (1921).

[96] "Hardly anything of greater private or public gravity is ever presented to the court, and yet these matters are constantly receiving adjudication without a single witness brought before the judge. It is a bad practice. I confess my inability to determine with any satisfaction from an inspection of inanimate manuscript, questions of veracity. In disposing of the present rule, I am com-

that the judge must divine the truth.[97] Such being the materials for judgment and such the industrial environment which so largely conditions them, with what awareness do judges read these affidavits and what criteria do they avow for choice in a conflict of such doubtful claims?

". . . common knowledge that one charged with the commission of a crime is not prone to admit his guilt"[98] is sometimes made to serve as a touchstone of truth. "Usual experience in such matters"[99] resolves the antinomy of affidavits in other cases. One judge faced with sharply conflicting affidavits as to violence in the course of a picketing demonstration, deduces truth from his own conception of labor tactics: "Picketing unaccompanied by threats and intimidation is a useless weapon. . . . If done peaceably it would be futile. It follows then that the fear, if not the terror that the picketing carries with it, is the keystone of the

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pelled to find, as best I may from perusing two hundred and thirty-five lifeless typewritten pages of conflicting evidence, the facts. . . ." Fuller, J. in Long *v.* Bricklayers' and Masons' International Union, 17 Pa. Dist. 984-85 (1908).

[97] "In the opinion filed by the trial court it is aptly remarked that the opposing affidavits, 'as is usual in such controversies, were directly contradictory of each other'; and that, in 'such irreconcilable conflict of testimony, it is often impossible to get a clue to the truth.'" Garrigan *v.* United States, 163 Fed. 16, 19-20 (C. C. A. 7th, 1908). Contrast with this, the more satisfactory results when the witnesses testify personally in open court. Thus, United Shoe Machinery Corporation *v.* Muther, 288 Fed. 283 (C. C. A. 1st, 1923), was a patent case in which Federal Equity Rule 46, requiring testimony in open court, was invoked. Said the Court on appeal from the findings of fact: "We do not think it necessary to discuss in detail the great mass of testimony which was taken. It is enough to say that the testimony was conflicting, and that the learned judge who sat in the District Court, having the opportunity of observing the appearance of the witnesses, which he states constituted an unusually important fact in arriving at his conclusion. . . ." (at 292).

[98] Arnheim Inc. *v.* Hillman, 198 App. Div. 88, 94 (N. Y., 1921); Skolny *v.* Hillman, 114 Misc. 571 (N. Y., 1921). So in Gulf Bag Co. *v.* Suttner, 124 Fed. 467, 468 (N. D. Cal., 1903): "We have, then, upon one side the specific charge of lawlessness; upon the other, the specific denial thereof. It seems improbable that complaint would make the showing that it has, without any substantial facts as a basis. On the contrary, it is seldom that any defendants or others admit the error of their ways."

[99] Coney Island Laundry Co., Inc. *v.* Kornfeld, N. Y. L. J. Feb. 24, 1928, p. 2532. And see Skolny *v.* Hillman, 114 Misc. 571, 578 (N. Y., 1921): "At one time denial of the equities of the bill defeated the application for such relief. That time is gone. Acts which amount to a crime are not usually admitted." Pre' Catelan, Inc. *v.* Int. Fed. of Workers, 114 Misc. 662, 667 (N. Y., 1921): "If mere denials were controlling on applications for injunctions, that writ would seldom issue."

arch . . . to the success of the cause."[100] Therefore, an admission of picketing admits violence. But other judges demand sturdier proof.[101] "This should be in the form of evidence of the prosecuting of the individuals who are claimed to have indulged in violence."[102] And some courts have been astute enough to weigh the circumstances affecting the credibility of affiants, their position for observation, their subjection to bias.[103]

For the solution of the other important issue of fact—responsibility for acts of disorder[104]—"presumptions" are invoked. The union and its officers may repudiate the violent deeds,[105] may solemnly disavow them,[106] may importune the strikers to be orderly and law-abiding,[107] and yet may be held.[108] "Authorization" has been found as a fact where the unlawful acts "have been on such a large scale, and in point of time and place so connected with the admitted conduct of the strike, that it is impossible on the record here to view them in any other light than as done in furtherance of a common purpose and as part of a common plan"; [109] where the union has failed to discipline the wrong-doer; [110] where the union has granted strike benefits.[111] Other courts, contrariwise, have held fast to general agency principles and have exacted the full quantum of proof normally required to establish the responsibility of one person for the acts of another. They have insisted that the affidavits prove the union to be chargeable with the acts complained of, as a condition precedent to the inclusion of the union within the restraint of the injunction.[112] As one New York judge rhetorically asks: "Is it the law that a presumption of guilt attaches to a labor union association?" [113]

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[100] Pre' Catelan, Inc. *v.* Int. Fed. of Workers, 114 Misc. 662, 669 (N. Y., 1921). So, also, Schwartz & Jaffee, Inc. *v.* Hillman, 115 Misc. 61 (N. Y., 1921).

[101] In Foster *v.* Retail Clerks' Protective Assn., 39 Misc. 48, 49 (N. Y., 1902), Judge Andrews said: "Only positive allegations and allegations on information and belief where the source of the information and the grounds of the belief are given, can be taken as true. . . . So, too," he went on, "epithets are not facts. The question is not whether an affidavit designates a certain act as a threat, or as intimidation, as a conspiracy or as malicious that is important, but whether the facts stated show that the act deserves such a designation."

[102] Albee & Godfrey Co. *v.* Arci *et al.*, 201 N. Y. Supp. 172, 173 (1923). The court added: "The methods of proof indicated, of course, are not exclusive, but substitute methods should carry with them the same degree of persuasiveness that inhere in the indicated methods." See Krebs *v.* Rosenstein, 31 Misc. 661 (N. Y., 1900); N. & R. Theatres, Inc. *v.* Basson, 127 Misc. 271 (N. Y., 1925).

[103] Levy *v.* Rosenstein, 66 N. Y. Supp. 101 (1900); Foster *v.* Retail Clerks' Protective Assn., 39 Misc. 48 (N. Y., 1902). In King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257, 259 (C. C. A. 6th, 1920), the affiants had repudiated their affidavits but the upper court held: "We cannot say he [the trial judge] was wrong in thinking that the earlier statements were less likely than the later ones to be the result of undue pressure. . . ."

[104] It is, of course, elementary that an organization is not responsible for unlawful activities of members in the absence of some evidence of authorization or ratification. See, *e.g.*, Aluminum Castings Co. *v.* Local No. 84, I. M. U., 197 Fed. 221 (W. D. N. Y., 1912).

[105] Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557 (D. Mont. 1922).

[106] Alaska S. S. Co. *v.* International Longshoremen's Ass'n, 236 Fed. 964 (W. D. Wash., 1916). See Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901).

[107] Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901); Goldfield Consol. Mines Co. *v.* Goldfield M. U. No. 220, 159 Fed. 500 (D. Nev., 1908).

[108] See, e.g., Jones *v.* Maher, 62 Misc. 388 (N. Y., 1909); *aff'd* without opinion, 141 App. Div. 919 (N. Y., 1910).

To expect such a mode of hearing to elicit the truth about these ambiguous acts and motives of men is to look for miracles. To ask such a system of procedure to work without serious friction and without arousing wide scepticism regarding law's fair-dealing is to subject the legal order to undue stress and strain. The chancellors of the fourteenth and fifteenth centuries pursued more rational methods of eliciting truth: "The examination was under oath; it is sometimes said to be on the sacrament, sometimes 'on the boke.' If the defendants lived at some distance from London, or were ill and unable to appear, a commission by writ of Dedimus potestatem would be granted to take the defendant's answer and also to examine witnesses. . . . Evidence verbal or written was placed on the same footing, but the chancellor compelled a petitioner to prove his case. If he deemed the evidence insufficient or conflicting, he would call for more, and no decree could be had until it was produced." [114]

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[109] United States *v.* Railway Employees' Dept. A. F. L., 283 Fed. 479, 493 (N. D. Ill., 1922). Union Pac. R. Co. *v.* Ruef, 120 Fed. 102, 128 (D. Nev. 1902): "Can it be doubted for a moment that, had there been no strike and no picketing, there would have been no assaults, no threats, and no intimidation?"

[110] Alaska S. S. Co. *v.* International Longshoremen's Ass'n, 236 Fed. 964 (W. D. Wash., 1916); United Traction Co. *v.* Droogan, 115 Misc. 672 (N. Y., 1921).

[111] Jones *v.* Maher, 62 Misc. 388 (N. Y., 1909). See Connett *v.* United Hatters, 76 N. J. Eq. 202 (1909). *Cf.* Denaby & Cadeby Main Collieries, Ltd., *v.* Yorkshire Miners' Assn., [1906] A. C. 384. In the unreported case of Industrial Council *v.* Sigman, N. Y. L. J., Sept. 30, 1926, p. 2238, the court traced responsibility to the union by pointing out that "on several occasions hundreds of the strikers, or so-called pickets, have been arrested and brought before city magistrates, where it would appear in nearly every instance their fines have been paid by the defendant unions."

[112] Butterick Pub. Co. *v.* Typo. Union No. 6, 50 Misc. 1 (N. Y., 1906); Searle Manufacturing Co. *v.* Terry, 56 Misc. 265 (N. Y., 1905); Russell & Sons *v.* Stampers' & G. L. L. U. No. 22, 57 Misc. 96 (N. Y., 1907). See (1922) 32 YALE L. J. 59, 63.

[113] Russell & Sons *v.* Stampers' & G. L. L. U. No. 22, 57 Misc. 96, 103 (N. Y., 1907). See Mills *v.* United States Printing Co., 99 App. Div. 605 (N. Y., 1904).

This ancient wisdom has been forgotten in the most sensitive contact between law and feeling. To quote Judge Amidon again ". . . affidavits are an untrustworthy guide for judicial action . . . it is peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice. . . . Experience . . . has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing. These witnesses have been subjected to oral examination. The court has had a chance to observe their demeanor. A comparison of the picture produced by their testimony with that produced by their affidavits has proven the utter untrustworthiness of affidavits. Such documents are packed with falsehoods, or with half-truths, which in such a matter are more deceptive than deliberate falsehoods." [115]

These evils have been vigorously pressed upon Congress for correction. In five successive messages President Roosevelt [116] dealt with the problem:

> "It must be remembered that a preliminary injunction in a labor case, if granted without adequate proof . . . may often settle the dispute between the parties; and therefore if improperly granted may do ir-

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[114] From the description of W. T. BARBOUR in HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY (1914) (Oxford Studies in Social and Legal History, 149), quoted in 5 HOLDWORTH, HISTORY OF THE ENGLISH LAW (1924) 286.

[115] Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 416 (D. N. Dak., 1923).

[116] 15 MESSAGES AND PAPERS OF THE PRESIDENTS 6983 (Dec. 5, 1905); *ibid.* 7026-27 (Dec. 3, 1906); *ibid.* 7086 (Dec. 3, 1907); 16 *ibid.* 7190 (April 27, 1908); *ibid.* 7213 (Dec. 8, 1908). In his message on April 27, 1908, he wrote: "They are blind who fail to realize the extreme bitterness caused among large bodies

> reparable wrong . . . there have undoubtedly been flagrant wrongs committed by judges in connection with labor disputes even within the last few years. . . ." [117]

His demand for reform was renewed by Mr. Taft,[118] and finally, during Mr. Wilson's first administration Congress acted.[119] But here, too, legislation hardly effected a change in procedure. In New York, also, legislative relief for the evils of the practice has thus far been denied though the matter enlisted the urgent recommendations of Governor Smith:

> "A source of dissatisfaction frequently expressed concerning the courts is the present practice which prevails with reference to the issuance of injunctions in labor disputes. The criticism is made, and in many cases properly so, that preliminary injunctions in these cases are issued on affidavits and without a full and comprehensive knowledge of facts. I need hardly call attention to the importance that these so-called labor injunctions play in our industrial and social life. A better feeling between labor and capital will be brought about if, before such injunctions are issued, a preliminary hearing is held to establish the facts, and I recommend an amendment along these lines." [120]

For the present, courts themselves must supply the corrective resources over their procedure. Some courts have frankly acknowledged the treachery of affidavits.[121] A preliminary injunc-

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of worthy citizens by the use that has been repeatedly made of the power of injunction in labor disputes."

[117] 15 *ibid* 7027.

[118] Inaugural address, March 4, 1909, 16 *ibid*. 7378.

[119] Act of Oct. 15, 1914, 38 STAT. 730, 28 U. S. C. § 381.

[120] Annual Message of Governor Alfred E. Smith to the New York Legislature, Jan. 6, 1926, *N. Y. Times*, Jan. 7, 1926, p. 11, col. 1; see also Governor Smith's Annual Message to the New York Legislature for 1928, *N. Y. Times*, Jan. 5, 1928, p. 17, col. 1. See, for a discussion of legislative correctives, Chapter IV.

[121] See Order of R.R. Telegraphers *v*. Louisville & N. R. Co., 148 Fed. 437 (W. D. Ky., 1906), and Wabash R. *v*. Hannahan, 121 Fed. 563 (E. D. Mo., 1903). In the latter case the court said: "The categorical and unevasive denial, both in sworn answer and separate affidavits, by each of the defendants . . . and the apparently candid and ingenuous avowal of no such intention or purpose in the future . . . induce this court to believe . . . no coercive, violent, or other unlawful means will be resorted to by the defendants. . . ." (at 577) "It is also held that the extent to which picketing in an industrial dispute should be enjoined is a question for the judgment of the judge who has heard the witnesses, familiarized himself with the *locus in quo*, and observed the tendencies to disturbance and conflict. . . . In this case no witnesses have been *heard*. All that has been

tion, they have argued, is no less than an execution in advance of a full hearing and a final determination of the issues.[122] It is a drastic measure which may deprive defendants of rights confirmed in them by the final decree. They have therefore denied such preliminary relief where its propriety was doubtful.[123] For the most part, however, courts have granted the injunction despite grave doubt, on the theory that the preliminary injunction does not pass finally on the merits of the controversy.[124] At least

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done is to read affidavits of divers persons without testing their knowledge, or intelligence, or credibility, by cross-examination and by observing their conduct and demeanor." Pac. Coast Coal Co. *v.* Dist. No. 10, U. M. W. A., 122 Wash. 423, 435 (1922).

In a suit for an injunction to prohibit violation of the Volstead Act, Judge Wilkerson ruled: "Where substantial doubt exists as to the wisdom of the issuance of an injunction, that fact alone suffices to withhold it." Cywan *v.* Blair, 16 F. (2d) 279, 281 (N. D. Ill., 1926). See also Ruckstell Sales & Mfg. Co. *v.* Perfecto Gear Differential Co., 14 F. (2d) 207 (C. C. A. 9th, 1926); United States *v.* Zukauckas, 293 Fed. 756 (E. D. Pa., 1923).

[122] In denying an *ex parte* injunction, a federal judge said: "The court may not be used as a strike-breaker by either party, by withholding from one party orders or decrees to which it is clearly entitled, or granting orders ex parte, where it is not made clearly to appear that the rights of the complainant are being infringed by the defendants." Puget Sound Traction Light & Power Co. *v.* Whitley, 243 Fed. 945, 947 (W. D. Wash., 1917). In Reardon, Inc. *v.* Caton, 189 App. Div. 501 (N. Y., 1919) the court denied an injunction restraining employees from refusing to accept freight hauled by non-union truckmen on the ground that this would in effect be a mandatory injunction compelling the men to accept the freight and—"Is this to be brought about by injunction of a court of equity, in advance of a trial of the issue . . . ?" (at 511).

[123] "It is a principle long recognized that the power to grant the extraordinary remedy of injunction should be exercised by courts with great caution and applied only in very clear cases." Barker Painting Co. *v.* Brotherhood of Painters, etc., 15 F. (2d) 16 (C. C. A. 3rd, 1926). In Moran *v.* Lasette, 221 App. Div. 118, 121 (N. Y., 1927) where a labor union was denied injunctive relief as against an alleged breach of contract by an employers' association the court (*per* Proskauer, J.) said: "To justify this drastic temporary injunction, the plaintiff was required to show a clear legal right and a threatened irreparable injury. It shows neither. The interference of a court of equity in labor disputes directed either against employer or laborer should be exercised sparingly and with caution (*Exchange Bakery and Restaurant, Inc.* v. *Rifkin,* 245 N. Y. 260)."

[124] "Nor do we consider it necessary upon this appeal [from an order denying a motion for an injunction *pendente lite*] to pass upon the merits of the controversy . . . since of necessity such a question cannot be satisfactorily determined upon the conflicting affidavits before us." Arnheim, Inc. *v.* Hillman, 198 App. Div. 88, 93 (N. Y., 1921). See New York, N. H. & H. R. Co. *v.* Railway Employees' Dept., 288 Fed. 588 (D. Conn., 1923) and cases collected therein at pp. 592 *et seq.* In Carter *v.* Fortney, 172 Fed. 722, 723 (N. D. W. Va., 1909) the

for labor disputes such a rationale must be rejected. Of eighty-eight temporary injunctions revealed by the Federal Reporter, sixty-eight never were appealed from, and fifty-six, whether appealed or not, never went to final hearing on the merits. In New York, of thirty-five injunctions *pendente lite* issued during the five-year period 1923-1927, in no[125] instance was there further *lis*. These statistics reveal a situation peculiar to labor disputes. The strike—this is true in a great many of the cases—may have ended; [126] the strikers may lack funds for litigation; [127] the strikers may be convinced "that there is nothing

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court remarked: "the defendants . . . have filed . . . as their joint affidavit . . . their joint answer . . . in which they distinctly and explicitly deny all allegations of conspiracy, all charges and all and any acts . . . jeers, hootings, and assaults and violence charged against them. . . ." After comparing all of the numerous affidavits before it the court continued (at 729): "It is impossible to reconcile the statements of these conflicting affidavits. It cannot be done. There is clear perjury somewhere, and it should be sifted out and prosecuted.

"It seems to me that there is nothing for me to do but to award the preliminary injunction, require the parties to take the evidence, and determine finally the case upon its merits." And see Gulf Bag Co. *v.* Suttner, 124 Fed. 467 (N. D. Cal., 1903). But *cf.* Mills *v.* United States Printing Co., 99 App. Div. 605, 608 (N. Y., 1904): "The record contains many affidavits full of allegations, denials, counter allegations and counter denials. This is natural to a hearing of such issues upon *ex parte* statements unsubjected to the tests of cross-examination, and unrestricted by rulings upon relevancy, materiality or competency. It may be that the judgment upon trial will be far different from any preliminary relief which this record justifies. (See *Warsaw Water Works Co.* v. *Warsaw,* 4 App. Div. 509; *Meyers* v. *City of New York,* 58 *id.* 534)." And see Wyckoff Amusement Co., Inc. *v.* Kaplan, 183 App. Div. 205 (N. Y., 1918).

[125] See Appendix III. It is assumed that any appeal from these orders would be found in the official reports.

[126] See Frey, The Labor Injunction (1922) 85. Settlement of a strike pending appeal renders moot the legal challenge of the propriety of the issuance of the decree, and the appeal, therefore, will be dismissed. See O'Brien *v.* Fackenthal, 284 Fed. 850 (C. C. A. 6th, 1922); Masses Pub. Co. *v.* Patten, 245 Fed. 102 (C. C. A. 2nd, 1917); Dakota Coal Co. *v.* Fraser, 267 Fed. 130 (C. C. A. 8th, 1920). Witte, Industrial Comm. Appendix B (1915). A striking bit of evidence is afforded by a recent report of the Bureau of Labor Statistics, which analyzed the length of strikes in the single month of May, 1928: "Of these industrial disputes for the month, 33 lasted one-half month or less, nine others less than a month, five others less than two months, two less than three months and one each less than three and four months respectively." *U. S. Daily,* July 16, 1928, p. 1.

[127] See testimony of President Green, Hearings on S. 1482 (*supra* note 6) 92: "I wish I could submit to you the figures showing the large sums of money

to be gained by fighting injunctions issued by judges who are hostile to organized labor."[128] Whatever the reason, it is undeniably the fact that the preliminary injunction in the main determines and terminates the controversy in court. The tentative truth results in making ultimate truth irrelevant.

Two other solving phrases are used to justify equity's interference despite frank agnosticism in the mind of the court itself concerning the facts. The preliminary injunction, it is said, can do no harm since it is aimed only at illegal acts,[129] and acts which the

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which we have been required to raise and pay in order to meet the court costs and the attorney fees.

"Now, that means that even if we win, we lose."

[128] This statement, typical of the attitude of labor unions, is taken from the *Machinists' Journal* of September, 1909 (p. 816). See Hearings on S. 1482 (*supra,* note 6), p. 137; Chafee, *Progress of the Law, 1919-1920* (1921) 34 Harv. L. Rev. 388, 406.

[129] N. Y. Cent. Iron Works Co. *v.* Brennan, 105 N. Y. Supp. 865, 871 (1907): "If that was not their purpose, then this injunction can do them no harm." Wyckoff Amusement Co., Inc. *v.* Kaplan, 183 App. Div. 205 (N. Y., 1918); United Traction Co. v. Droogan, 115 Misc. 672 (N. Y., 1921).

The consequences of such an attitude have been frequently made clear: Mr. (now Chief Justice) Taft, in his address accepting the nomination for President in 1908, said: "In case of a lawful strike the sending of a formidable document restraining a number of defendants from doing a great many things which the plaintiff avers they are threatening to do, often so discourages men, always reluctant to go into a strike, from continuing what is their lawful right." See Presidential Addresses and State Papers of William Howard Taft (1910) 24.

"A strike is a contention largely before the bar of public opinion and nothing will hurt the cause of the strikers more than an interference by the courts, which amounts to a public declaration that they are violating the law." Witte, *Value of Injunctions in Labor Disputes* (1924) 32 J. Pol. Econ. 335, 345.

A New York court has very aptly phrased the argument: ". . . the courts should not carelessly cast the weight of their mandates into the strife between employers and employees.

"In an evenly balanced, bitter, long drawn out labor struggle, an edict of the court, leveled at the strikers, shakes the morale of the workingmen. This is not the purpose of the injunction, although it is frequently, and perhaps generally, the purpose of the employer who seeks it. . . . The moral effect of an injunction order in such cases is tremendous. At once it gives the impression in the community that the strikers have violated the law. The court seems to have taken a hand in the struggle. This is the laymen's view. The injunction, thus shaping public opinion, is often decisive.

"In exercising its discretion the court cannot shut its eyes to this aspect of the case or ignore the far-reaching psychic effect of its mandate." *per* Howard, J., in Wood Mowing and Reaping M. Co. *v.* Toohey, 114 Misc. 185, 196-97 (N. Y., 1921).

See similarly the observation of Mr. T. C. Spelling: ". . . when an injunction defendants claim no right to do.[130] Again, it is urged that the decree born of a chancellor's conscience "is kinder than the club of the police",[131] better than "doubtful results" in a criminal court.[132] Presently it will be shown that such humility is neither wise nor kind, since it begs the most vulnerable charges against the injunction,—that the injunction includes more than the lawless; that it leaves the lawless undefined and thus terrorizes innocent conduct; that it employs the most powerful resources of the law on one side of a bitter social struggle.

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goes out in a labor dispute against strikers it indicates that some great judicial authority has examined the merits of the controversy between the parties and decided against one party, and it has a disastrous effect in the very nature of things." Senate Hearings on H. R. 23635, 62d Cong., 2d Sess., Aug. 13, 1912, p. 995.

[130] See Iron Molders' Union *v.* Niles-Bement-Pond Co., 258 Fed. 408 (C. C. A. 6th, 1918); Davis *v.* Zimmerman, 91 Hun. 489 (N. Y., 1895); Herzog *v.* Fitzgerald, 74 App. Div. 110 (N. Y., 1902); Davis Machine Co. *v.* Robinson, 41 Misc. 329 (N. Y., 1903).

[131] United Traction Co. *v.* Droogan, 115 Misc. 672 (N. Y., 1921). But *cf.* Puget Sound Traction, Light & Power Co. *v.* Whitley, 243 Fed. 945 (W. D. Wash., 1917) where an *ex parte* injunction was denied, the court remarking that the matter was one for the police and the police courts. And see Wood Mowing and Reaping M. Co. *v.* Toohey, 114 Misc. 185, 196 (N. Y., 1921) where the court said: "The Penal Law is a standing injunction against crime. . . . If the defendants are committing crime, the quick, summary, regular remedy is arrest and prosecution."

[132] Skolny *v.* Hillman, 114 Misc. 571, 580 (N. Y., 1921): "Under modern decisions courts of equity are more apt to restore order and confidence than doubtful results in a criminal court." *Cf.* Caldwell, J., dissenting in Hopkins *v.* Oxley Stave Co., 83 Fed. 912 (C. C. A. 8th, 1897).

CHAPTER III

THE SCOPE OF LABOR INJUNCTIONS AND THEIR ENFORCEMENT

JUDGMENT upon the use of the injunction in labor controversies must be based upon concrete instances. But, before turning to a critique of this material, an important procedural point must be noted.[1] In other than labor disputes, American decisions have applied the common law rule that an unincorporated association cannot sue or be sued as an entity.[2] With negligible exceptions, trade unions are unincorporated[3] and as such are denied endowment of rights, duties or liabilities.[4] Redress against these organizations was theoretically confined to individual liability of its members. To make an unincorporated labor union a party defendant is, according to the Massachusetts Supreme Judicial Court, "an impossibility. There is no such entity known to the law. . . ." [5] In fact, such an entity was known to the Massachusetts law as administered in dozens of *nisi prius* cases. These did not find their way into the conventional law reports but were recorded by the Massachusetts Bureau of Statistics.[6] A similar conflict between theory and practice is found in many federal decisions.[7] In such equitable litigations as those under scrutiny, the pressure of common sense was supported by the equitable doctrine of suit by representation which permits the issuance of a decree against persons not themselves subject to a court's order, on the theory that such persons are represented in court by actual litigants similarly circumstanced.[8] The doctrine was embodied in Federal Equity

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[1] (1922) 32 YALE L. J. 59. Chief Justice Taft in United Mine Workers of America *v.* Coronado Co., 259 U. S. 344, 390 (1922), said: "Though such a conclusion as to the suability of trades unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter."

[2] Pickett *v.* Walsh, 192 Mass. 572 (1906); Reynolds *v.* Davis, 198 Mass. 294 (1908); Hanke *v.* Cigar Makers' Union, 27 Misc. 529 (N. Y., 1899); Bossert *v.* Dhuy, 166 App. Div. 251 (N. Y., 1914) (*rev'd* on other grounds, 221 N. Y. 342 (1917)). And see these earlier federal decisions: American Steel & Wire Co. *v.* Wire Drawers' *etc.* Unions, 90 Fed. 598 (N. D. Ohio, 1898); Allis-Chalmers Co. *v.* Iron Molders' Union No. 125, 150 Fed. 155 (E. D. Wis., 1906); Oxley Stave Co. *v.* Coopers' International Union, 72 Fed. 695 (D. Kan., 1896). See DICEY ON PARTIES (1870) 148, 266, 384, 468; WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS (2d ed., 1923), 135, 425; Magill, *The Suability of Labor Unions* (1922) 1 N. C. L. REV. 81, 85; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383; and annotation in (1923) 27 A. L. R. 786.

[3] Massachusetts has a statute authorizing incorporation of labor unions, 1921 Gen. L. c. 180, §§ 15-19. So also, the United States, Act of June 29, 1886, 24 STAT. 86. See UNITED STATES BUREAU OF LABOR STATISTICS, Bulletins 370 and 403 where such laws are indexed under "Labor Organizations, incorporation, regulation, etc." A symposium on the incorporation of labor unions is found in the MONTHLY REVIEW OF THE NATIONAL CIVIC FEDERATION for April, 1903. For its legal aspect see Black, *Should Trade Unions and Employers' Associations be made Legally Responsible?* (1920) NATIONAL INDUSTRIAL CONFERENCE BOARD, Sp. Rep. 10. Organized labor has always opposed incorporation. See AMERICAN FEDERATION OF LABOR, HISTORY, ENCYCLOPEDIA AND REFERENCE BOOK (1919) 244; ADAMS AND SUMNER, LABOR PROBLEMS (1914) 274; BRANDEIS, BUSINESS A PROFESSION (1914) 13.

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[4] See, *e.g.*, Karges Furniture Co. *v.* Amalgamated, *etc.* Union, 165 Ind. 421 (1905).

[5] Pickett *v.* Walsh, 192 Mass. 572, 589, 590 (1906). The court remarked further: "A trade union was made a party defendant in *Vegelahn* v. *Guntner*, 167 Mass. 92, and the anomaly seems to have escaped attention."

[6] These are a few of the cases: R. S. Brine *v.* Team Drivers' Union, Suffolk County, Eq. 658 (1902); American Woolen Co. *v.* Weavers' Union, *ibid.* 825 Eq., 842 Eq.; Prentice Brothers Co. *v.* Worcester Lodge of Machinists, Worcester County, Eq. 543 (1902); Walton & Logan Co. *v.* Knights of Labor No. 3662, *et al.* Essex County, Eq. 2565 (1903). See the list of injunctions issued in Massachusetts 1898-1908, MASS. LABOR BULLETIN No. 70, pp. 128-44.

[7] See, *e.g.*, Coeur d'Alene Consolidated & Mining Co. *v.* Miners' Union, 51 Fed. 260 (D. Ida., 1892); United States *v.* Workingmen's Amalgamated Council, 54 Fed. 994 (E. D. La., 1893); Otis Steel Co. v. Local Union No. 218, 110 Fed. 698 (N. D. Ohio, 1901); Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264 (N. D. Ill., 1901); Goldfield Consol. Mines Co. *v.* Goldfield M. U. No. 220, 159 Fed. 500 (D. Nev., 1908). Chief Justice Taft, in his opinion in the Coronado Coal Co. Case, 259 U. S. 344 (1922), adverted to the considerable body of authorities on this point. He said: ". . . out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of suing and being sued." (at 387-88)

[8] FREEMAN ON JUDGMENTS (5th ed. 1925) § 436; STORY, EQUITY PLEADINGS (8th ed., 1870) §§ 94, 97; St. Germain *v.* Bakery &c Workers' Union, 97 Wash. 282 (1917); Branson *v.* I. W. W., 30 Nev. 270 (1908). "The rule of equity pleading which dispenses with the joinder of all members of an unincorporated association

Rule 38[9] and in the code provisions of many states.[10] From this it was an easy step to permit action against the membership of the association by naming an officer or the association itself as party defendant, though continuing to preserve intact the individual liability of the members of the association.[11] This procedure was sanctioned in many states, but only by legislation.[12]

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depends upon their being members of a class who have a common interest and are too numerous to be made individually parties defendant even if their names are known to the plaintiff. The proper way of bringing them before the court is to join as parties defendant persons who are alleged to be and are proper representatives of the class, describing the class to which the members belong and stating that the members are too numerous to be joined as parties defendant. See *Pickett* v. *Walsh,* 192 Mass. 572." Reynolds *v.* Davis, 198 Mass. 294, 301 (1908); and see Donovan *v.* Danielson, 244 Mass. 432 (1923); American Fed. of Labor *v.* Buck's Stove & R. Co., 33 App. D. C. 83 (1909), appeal dismissed, 219 U. S. 581 (1911). Where the suit is in a federal court the decree is binding upon the persons represented, even though their original joinder would have defeated the jurisdiction because of the lack of the necessary diversity of citizenship, Supreme Tribe of Ben-Hur *v.* Cauble, 255 U. S. 356 (1921). See *infra* note 17.

[9] Promulgated by the Supreme Court, Nov. 4, 1912 (226 U. S. 659), adapted from the old Code of Civil Procedure of New York, § 448. The corresponding English provision is Rule 9, Order XVI (see Annual Practice, 1929, p. 240), and see Lord Macnaughten in Bedford *v.* Ellis [1901], A. C. 1, 8. Federal Equity Rule 38 reads: "When the question is one of common or general interest to many persons contsituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U. S. 659. *Cf.* the old Federal Equity Rule 48 (210 U. S. 524) under which rights of absent parties were reserved.

[10] N. Y. Civil Practice Act, § 195 the wording of which is nearly identical with that of Federal Equity Rule 38.

[11] See, for example, N. Y. General Associations Law, § 16, N. Y. L., 1920, c. 915.

[12] N. Y. General Associations Law, Article 3, N. Y. L. 1920, c. 915. Statutes of the respective states are dealt with in the following cases: Vance *v.* McGinley, 39 Mont. 46 (1909); Bruns *v.* Milk Wagon Drivers' Union, Local 603, 242 S. W. 419 (Mo., 1922); Patch Mfg. Co. *v.* Protection Lodge, 77 Vt. 294 (1905); Davison *v.* Holden, 55 Conn. 103 (1887); U. S. Heater Co. *v.* Molders' Union, 129 Mich. 354 (1902); St. Louis Southwestern Ry. Co. *v.* Thompson, 192 S. W. 1095 (Tex. 1917). The New York Statute was applied to the following labor injunction cases: Russell & Sons *v.* Stampers & G. L. L. U. No. 22, 57 Misc. 96 (N.Y.,1907); Beattie *v.* Callanan, 67 App. Div. 14 (N. Y., 1901); Horseshoers' Protec. Assn. *v.* Quinlivan, 83 App. Div. 459 (N. Y., 1903); Grassi Contracting Co. *v.* Bennett, 174 App. Div. 244 (N. Y., 1916); Heitkamper *v.* Hoffmann, 99 Misc. 543 (N. Y., 1917). Individual members of the association should not be joined as defendants (Skolny *v.* Hillman, 114 Misc. 571 (N. Y., 1921), though the action must be one for which all the members of the association are liable (Friedman & Co., Inc. *v.* Amal. Cloth. Workers, 115 Misc. 44 (N. Y., 1921)).

Fortified by a statutory definition, the Supreme Court of the United States in the *Coronado Coal Case,*[13] America's analogue to the Taff Vale judgment,[14] established as doctrine for the federal courts [15] that a labor union is to be considered in law, what it is in life, an entity distinct from its individual members, suable in the common name and liable to damages from the common fund.[16] By virtue then either of statutory or judicial innovation, legal theory has been conforming to industrial reality, and now subjects a collectivity to responsibility for its tortious acts. What are "its" acts, raises problems as to responsibility for conduct of agents that are outside the scope of our present inquiry.[17]

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[13] United Mine Workers *v.* Coronado Co., 259 U. S. 344 (1922), *aff'g* on this point the decision of the lower court, 258 Fed. 829 (C. C. A. 8th, 1919). Extended from application to a national union to application to a local union, Christian *v.* International Ass'n of Machinists, 7 F. (2d) 481 (E. D. Ky., 1925), but see limitations of doctrine illustrated by *Ex parte* Edelstein, 30 F. (2d) 636 (C.C.A. 2nd, 1929). See Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977, and Frankfurter, *The Coronado Case* (1922) 31 *New Republic,* 328. For criticism of the Coronado Case, see WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929), c. IX.

In Local Union No. 1562, United Mine Workers of America *v.* William Williams, 59 Can. Sup. Ct. 240 (1919), the Supreme Court of Canada held that an unincorporated trade union as such was not amenable to suit; see also Society Brand Clothes, Ltd., *v.* Amalgamated Clothing Workers, an unreported Quebec judgment now on review before the Cour du Banc du Roi.

[14] Taff Vale Ry. *v.* Amalgamated Society of Ry. Servants [1901] A. C. 426, and see Cotter *v.* National Union of Seamen [1929] 2 Ch. 58. Taft, C. J., cited and approved the Taff Vale decision in the Coronado Case, 259 U. S. 344, 390 (1922). As to the significance of the Taff Vale Case upon English politics and legislation, see Lord Haldane in Vacher & Sons *v.* London Society of Compositors [1913] A. C. 107, 112, and WEBB, HISTORY OF TRADE UNIONISM (Rev. ed. 1920) 600.

[15] Of course, this decision does not affect the practice in state courts. See Cahill *v.* Plumbers' etc., Local 93 *et al.,* 238 Ill. App. 123 (1925) where it was said of the Coronado Case (at 131): "Moreover, it is the rule in Illinois that in respect to questions of general law over which the State court has complete and final jurisdiction, the decisions of the Supreme Court of the United States are merely persuasive authority and not binding precedents. . . ." See *supra* Chapter I, p. 5 *et seq.*

[16] "It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members . . . could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless." 259 U. S. 344, 388-89.

[17] Whether "representative" defendants are chosen or whether the "association"

PERSONS BOUND BY INJUNCTIONS

The technique for bringing litigants formally before a court has required a dialectic adjustment between common law conceptions concerning legal personality and the modern industrial phenomena of concerted group action. No such intellectual scruples have embarrassed the courts in demanding obedience for labor injunctions from the community at large, however limited the court's authority in defining the formal litigant. Injunction suits have been entitled by naming as defendants the union and its officers, or, less frequently, persons prominent in activities deemed illegal. But the parties defendant named in the moving papers by no means disclose the sway of injunctive relief in labor disputes.[18]

Save for Massachusetts, this finds repeated illustration. The five illustrative cases reported by the Massachusetts Bureau of Statistics, in 1910,[19] limited the prohibition of decrees to

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name is used, the plaintiff has the burden of proving that all individual defendants are liable on ordinary agency principles. See McCabe *v.* Goodfellow, 133 N. Y. 89 (1892); Schouten *v.* Alpine, 215 N. Y. 225 (1915); Hill *v.* Eagle Glass & Mfg. Co., 219 Fed. 719 (C. C. A. 4th, 1915), *rev'd* on another ground in Eagle Glass & Mfg. Co. *v.* Rowe, 245 U. S. 275 (1917). See Russell & Sons *v.* Stampers & G. L. L. U. No. 22, 57 Misc. 96 (N. Y., 1907), where the court said (at 102): "Conclusive proof should appear upon which to base the charge that the defendant associations, as such, promoted or ratified the acts complained of, and while this may be done circumstantially where a conspiracy is alleged, the circumstances should be tantamount to direct proof." And see Segenfeld *v.* Friedman, 117 Misc. 731 (N. Y., 1922); F. C. Church Shoe Co. *v.* Turner, 279 S. W. 232 (Mo., 1926). *Cf.* Michaels v. Hillman, 112 Misc. 395 (N. Y., 1920); Kroger Grocery & B. Co. *v.* Retail Clerks' I. P. Ass'n, 250 Fed. 890 (E. D. Mo., 1918); Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557 (D. Mont., 1922). And see a late Massachusetts case subjecting the union to a judgment of $60,000, Alden Bros. Co. *v.* Dunn, Mass. Advance Sheets, p. 1555 (Sept. 13, 1928), 162 N. E. 773.

[18] Lord Eldon in Iveson *v.* Harris, 7 Vesey Jr., 251, 256-57 (1802) said: ". . . I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice, was that he must be brought into Court, so as according to the ancient laws and usages of the country be made a subject of the writ. . . . I find, the Court has adhered very closely to the principle, that you cannot have an injunction except against a party to the suit. . . . The Court has no right to grant an injunction against a person, whom they have not brought, or attempted to bring, before the Court by *Subpoena*. . . ."

[19] See Labor Bulletin No. 70 (prepared by the Massachusetts Bureau of Statistics) LABOR INJUNCTIONS IN MASSACHUSETTS, pp. 99-127.

> "You the respondents . . . [naming them] and each of you individually and as officers and agents of said union and organizations, your attorneys and counsellors. . . ."[20]

Later cases have remained substantially in accord with this formula.[21] The New York injunctions are not so restricted. In three of the five injunctions that came before the Court of Appeals for review within recent years, compliance with the decree was required not only of persons named as defendants, but also of "their attorneys, agents, servants, associates and all persons acting in aid of or in connection with them and each of them."[22] In two cases the relief was more limited. In *Exchange Bakery* v. *Rifkin,* the injunction addressed itself to "the defendants and each and every one of them, their agents, and servants";[23] in the *Auburn Draying Co. Case,* it ran against "each of the defendants herein, and each and all of the members of the defendant unions, and each and all of the members of the Central Labor Union, defendant herein. . . ."[24]

The federal courts have given the labor injunction its farthest reach of application. In the *Debs Case,* the famous "omnibus" injunction was issued against the defendants, "and all persons combining and conspiring with them and all other persons whomsoever".[25] An even earlier decree ran against "all persons generally".[26] When the phrasing of the Debs injunction was still warm, Mr. Dunbar, a conservative leader of the Bar, protested against it: "If the course there followed can be supported, the principles of equity jurisprudence have received an important extension which may render 'government by injunction' more than a mere epithet."[27] Later decrees have followed and extended the early models, bringing within the area of potential contempt the conduct of all undefined persons who in the future might threaten or encourage or commit violation of the ambiguous schedule of forbidden acts.[28] Thus, in the recent *Tri-City Central Trades Council Case*,[29] the following clause was allowed to stand by the Supreme Court of the United States:

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[20] This is the verbatim phraseology used in the injunction *ad interim* granted in Boston Herald Co. *v.* Driscoll, *ibid.*, p. 114.

[21] See, *e.g.*, Densten Hair Co. *v.* United Leather Workers, 237 Mass. 199 (1921), where the pertinent part of the decree precedes the court's opinion. The words were: "The defendants and each of them, their agents, servants, confederates and associates and all persons acting for or in behalf of them or any of them." (at 200.)

[22] Bossert *v.* Dhuy, 221 N. Y. 342, 344 (1917) (the decree is set forth in the report of the case); A. L. Reed Co. *v.* Whiteman, 238 N. Y. 545 (1924) (the decree is set forth in the report of the case); Interborough Rapid Transit Co. *v.* Lavin, 247 N. Y. 65 (1928) (the decree is not reported, but see record on appeal). The same form runs practically throughout all of the available decrees for the corresponding period in New York courts of first instance.

[23] 245 N. Y. 260 (1927) (the decree is not reported, but see record on appeal).

[24] Auburn Draying Co. *v.* Wardell, 227 N. Y. 1 (1919) (the decree is not reported, but see record on appeal).

[25] *In re* Debs, Petitioner, 158 U. S. 564, 570 (1895).

[26] Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 60 Fed. 803, 806 (E. D. Wis., 1894).

> ". . . the said defendants . . . and each of them, and all persons combining with, acting in concert with, or under their direction, control or advice, or under the direction, control, or advice of any of them, and all persons whomsoever. . . ."[30]

The ductile quality of that final phrase "all persons whomsoever" is now conventionally imparted, in one form or another, to federal labor injunctions. The Indianapolis Car Strike decree embraced "each and every person having knowledge of the existence of this order";[31] the Coal Strike injunction of 1919, "all other persons whomsoever"; [32] the Railway Shopmen's injunction in 1922, "all persons acting in aid of or in conjunction with them"; [33] the Ohio Coal Strike injunction in 1927, "all persons to whom notice of this order shall come".[34] We shall presently see how far these phrases are decorative, and how far they are rigorous instruments of legal control.

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[27] Dunbar, *Government by Injunction* (1897) 13 L. Q. Rev. 347, 354. For similar criticisms of the early injunction orders, see Allen, *Injunction and Organized Labor* (1894) 28 Am. L. Rev. 828, where it was said of those injunctions that they are directed against "ten thousand strikers and all the world besides." (at 857.)

"To be obliged to wait until the injunction is violated to determine against whom it was issued ought to be enough to show that it is not an injunction at all, but in the nature of a police proclamation, putting the community in general under peril of contempt if the proclamation be disobeyed." Note in (1894) 8 Harv. L. Rev. at 228.

[28] But *cf.* the meticulous discussion in Hitchman Coal & Coke Co. *v* Mitchell, 245 U. S. 229, 234-35 (1917) of the propriety of including personal relief by injunction against named persons who had not been served with process or who had not entered an appearance.

[29] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184 (1921).

[30] The permanent injunction will be found reprinted verbatim in 238 Fed. 728 (C. C. A. 7th, 1916). The quoted portion appears on page 729.

[31] See Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 1482, 70th Cong., 1st Sess. (1928) 233. This temporary injunction is reprinted on pages 232-33. An appeal from convictions for contempt of this injunction, affirming the convictions, is reported *sub nom.* Armstrong *v.* United States, 18 F. (2d) 371 (C. C. A. 7th, 1927).

THE RESTRAINING CLAUSES

On theory, the terms of the injunction are merely formulations of substantive law. In so far as there is a close correspondence between specific restraints of a decree and the general law of torts, not the decree but only the substantive law which sanctions it is open to question. *Aequitas sequitur legem.*[35] In good part the facts do not negate the theory. Employees may quit work singly and in so doing will not be enjoined; [36] their attempt to strike in concert may be enjoined when the strike is for an illegal purpose.[37] Officers of a union will be restrained from ordering an illegal strike and from participating in one already ordered.[38] Acts of violence, physical coercion and intimidation will of course be restrained, as well as interferences by these means with complainant's business relationships, whether with his employees or the world at large.[39] These are the generalized categories of conduct within which the injunction operates. But the full story of the injunction emerges only from the dreary documents which

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[32] From the unreported injunction issued in United States *v.* Frank J. Hayes *et al.*, reprinted in SAYRE, CASES ON LABOR LAW (1922), 757, and in Hearings on S. 1482 (*supra* note 31) p. 524. See Chafee, *The Progress of the Law, 1919-1920* (1921) 34 HARV. L. REV. 388, 401-07.

[33] The text of the injunction in this case is not given in the official reports of the three stages of this litigation. It is reprinted in Appendix IV. The bill of complaint setting forth prayers for relief is reprinted in 62 CONG. REC. 12097-12104, 12205 (1922). The bill of complaint was published also by the Government Printing Office in 1922.

The injunction in International Organization, *etc. v.* Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927) reprinted in Hearings on S. 1482 (*supra* note 31) pp. 462-63, restrained ". . . the said defendants herein above named in the caption of this decree, and each and all of them, including all members of said international organization, United Mine Workers of America, and of district Nos. 17 and 29 thereof, and of all subdivisions and local organizations of said districts, their officers, agents, servants, employees, and attorneys, and those in active concert or participating with them. . . ." (p. 463).

And see Schwartz *v.* United States, 217 Fed. 866, 867 (C. C. A. 4th, 1914): "'. . . and all persons combining and conspiring with the said designated persons and all other persons whomsoever.'"

[34] The temporary injunction is reprinted in Hearings on S. 1482 (*supra* note 31) p. 553 *et seq.* In a case that did not involve a labor injunction, Scott *v.* Donald, 165 U. S. 107, 117 (1897), the Supreme Court said of an injunction restraining "all other persons . . ." *etc.*: ". . . we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction."

[35] POUND, *On Certain Maxims of Equity*, CAMBRIDGE LEGAL ESSAYS (1926) 259, 270, gives the history of the maxim. See Chafee, *Does Equity Follow the Law of Torts?* (1926) 75 U. OF PA. L. REV. 1. In Woollcott *v.* Shubert, 169 App. Div. 194, 198 (N. Y., 1915), the court said: "The same rule thus applied to an action for damages on the case must equally apply to an action for an injunction, for the right to an injunction depends upon the necessity for preventing a legal

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injury from which damages may result, and if plaintiff can establish no case for claiming damages, he can show no ground for an injunction."

[36] See the decree issued by Judge Jenkins in Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 60 Fed. 803 (E. D. Wis., 1894) but modified in an opinion by Circuit Justice Harlan in Arthur *v.* Oakes, 63 Fed. 310 (C. C. A. 7th, 1894). For House resolution ordering the investigation of Judge Jenkins, to determine whether he "exceeded his jurisdiction in granting said writs, abused the powers or process of said court, or oppressively exercised the same, or has used his office as judge to intimidate or wrongfully restrain the employés of the Northern Pacific Railway Company . . ." see 26 CONG. REC. 2533, 2534, 2629 (1894). The report of the Judiciary Committee is H. R. 1049 (53rd Cong., 2nd Sess.). The Jenkins decree is reprinted with substantial fullness in (1894) 28 AM. L. REV. 828, 852. In Kemp *v.* Division No. 241, 255 Ill. 213, 219 (1912), Cooke, J., said: "It is the right of every workman, for any reason which may seem sufficient to him, or for no reason, to quit the service of another, unless bound by contract. This right cannot be abridged or taken away by any act of the legislature, nor is it subject to any control by the courts, it being guaranteed to every person under the jurisdiction of our government by the thirteenth amendment to the Federal constitution, which declares that involuntary servitude, except as a punishment for crime, shall not exist within the United States or any place subject to their jurisdiction." See also, Thayer, J., in Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 917 (C. C. A. 8th, 1897).

[37] See Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 730 (N. D. Ohio, 1893); Arthur *v.* Oakes, 63 Fed. 310 (C. C. A. 7th, 1894). And see note, *Right to Strike in War Time* (1919) 32 HARV. L. REV. 837, as well as cases collected in Chapter I, *supra* p. 26 *et seq.*

[38] See SAYRE, CASES ON LABOR LAW (1922) 795, and these cases: Columbus Heating & Ventilating Co. *v.* Pittsburgh Bldg. T. C. 17 F. (2d) 806 (W. D. Pa., 1927); Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993 (N. D. Ill., 1924).

In Levy *v.* Rosenstein, 66 N. Y. Supp. 101 (1900) where a restraining order against payment of strike benefits was dissolved, the court said (at 102): ". . . the object of making such payments was not to interfere with the plaintiffs' business, but to assist the strikers by helping to support them during this strike, and I do not think that such payments for that purpose are unlawful."

[39] See cases collected in Chapter I, *supra* p. 30 *et seq.*

set forth in detail the terms of restraints imposed upon workers and their sympathizers.[40]

In Massachusetts, the tendency is toward simplicity of expression. The inclusiveness of restraint achieved in that Commonwealth is due to the wide range of industrial conduct outlawed by the substantive doctrines of Massachusetts law. Its drastic prohibitions thus permit a brief order restraining defendants "from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass, and intimidate the plaintiff's customers or intending customers, or his [its] present employees or those desirous of entering his [its] employment, or by inducing *by any means whatever* any employee now or hereafter under written contract of employment to violate said contract." [41] This form is too Doric to satisfy a profession bred more and more in an elaborate and redundant style of labor injunctions. Complainant's attorney appealed from this order with a view to evoking a ruling that an attachment for contempt would follow upon

> " 'Any picketing which is annoying, harassing, or intimidating to the plaintiff's customers or his present employees . . .' "
> " 'All organized picketing or parading in front of the plaintiff's premises as well as any outcries by pickets or paraders . . .' "
> " 'Any system of organized picketing . . .' "
> " 'A combination to persuade customers not to patronize the plaintiff . . .' "
> " 'Any combination to picket the plaintiff's restaurants which has the effect of intimidating, annoying, or harassing the plaintiff's employees under contract of employment with the plaintiff . . .' "
> " 'Any inducing of employees under contract of employment to violate their contracts . . .' " [42]

But the Supreme Judicial Court of Massachusetts approved the decree, holding that the complainant's specific requests "were in effect granted." [43] For,

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[40] There is an initial handicap in such an undertaking that deserves mention. The injunction itself is rarely published verbatim with the report of the case. This is true of the federal courts as of the courts of New York and Massachusetts. The texts of the decrees are not always found even in the printed records on appeal. If not appealed, they lie buried in court files and lawyers' offices.

[41] Perpetual injunction entered in Walton Lunch Co. *v.* Kearney, 236 Mass. 310 (1920). Italics ours.

[42] *Ibid.* 310, 311, 312.

[43] *Ibid.* 315.

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> "Although not minute as to details, it unmistakably enjoins in every particular all the acts and conduct of the defendants set forth in the findings of fact as means by which the strike was carried on. The scope of the decree is coextensive with findings as to methods used to enforce the strike. Forms of interference with the plaintiff's rights which are not found to have been practised or threatened are not rightly included within the terms of an injunction."[44]

Brevity in labor injunctions satisfies the dictates of style and also helps the layman's respect for law. But ambiguity may lurk in brevity; it may thus become the instrument of severity. Too much must not be left to exegesis spelled out of allegations in a complaint. Other decrees in Massachusetts have followed a good middle course,—setting forth rather explicitly what is forbidden, but setting it forth only once.[45] Of this, a recent case will serve as a sample.[46] The injunction restrains interference or attempts to interfere with the plaintiff's business

> "1. By inducing or persuading, or attempting to induce or persuade any person now or hereafter in the employment of the plaintiff to leave the plaintiff's employment; or by preventing or attempting to prevent persons intending to enter the employment from doing so; or by any unlawful means preventing or seeking to prevent the plaintiff from entering into individual contracts with its employees;"
>
> "2. Or by persuading, inducing or coercing any person from patronizing the plaintiff or using or dealing in the plaintiff's products; or by inducing or attempting to induce any person now or hereafter under contract with the plaintiff to break said contract;"
>
> "3. Or by parading at or near the plaintiff's plant with signs, wagons or trucks for the purpose of interfering with or annoying or disturbing the plaintiff's employees."[47]

Except for the phrase "by any lawful means", this is at once clarity and brevity. If the remedy appears pervasive, it is no more so than is warranted by the substantive law of Massachusetts. The far-reaching limitations upon union activity are also disclosed by the cases restraining union officers from calling strikes and from acts necessary to the conduct of strikes.[48] But here, too, justification is found in the existing law of the state. In the main, Massachusetts courts are not inclined to use dubious phraseology in the labor injunction as a device for importing new social policy or giving distorted implications to accepted doctrine. They make law, so far as they make it, in their delimitation of legal rights and not in the drafting of decrees. In Massachusetts, equity aims to follow, not to improvise law.

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[44] *Ibid.* 314.

[45] See the decrees entered in Densten Hair Co. *v.* United Leather Workers, 237 Mass. 199, 200 (1921); Rice, Barton & Fales Machine &c Co. *v.* Willard, 242 Mass. 566 (1922); and see the sample Massachusetts injunctions reprinted in Labor Bulletins No. 70 (1910) and No. 117 (1916).

[46] Moore Drop Forging Co. *v.* McCarthy, 243 Mass. 554 (1923). For the latest example, see A. T. Stearns Lumber Co. *v.* Howlett, 260 Mass. 45 (1927). Another good illustration of this insistence upon confining the restraints to the proved conduct of the particular case is Hotel & Railroad News Co. *v.* Clark, 243 Mass. 317 (1922).

[47] The text is reprinted in the court's statement of the case, 243 Mass. 554, 558.

The New York Court of Appeals has had before it since 1917 five injunctions which have embodied equitable relief against practically every one of the customary activities challenged in labor cases. Two leading decisions involved the boycott: *Bossert* v. *Dhuy* and *Auburn Draying Co.* v. *Wardell*. The Bossert decree—a temporary injunction granted in October, 1911,[49]—made permanent in November, 1914,[50] and set aside by the Court of Appeals in October, 1917 [51]—restrained "conspiring, combining or acting in concert in any manner to injure or interfere with the plaintiffs' good will, trade or business" by any of these enumerated means:

> "By sending to any customer or prospective customer of plaintiffs, any letter, circular or communication printed, written or oral which in terms or by inference suggests that labor troubles will follow the use of materials purchased from plaintiffs or from any person, firm or corporation declared unfair or whose material does not bear the union label, meaning the plaintiffs thereby; or
>
> "By inducing, ordering . . . by any by-law . . . any person whatever to refrain from or cease working for any person, firm or corporation because they use material purchased of or furnished by plaintiffs . . ."
>
> ". . . inducing any workmen in other trades to quit work on any building because non-union carpenters are there employed to install the plaintiffs' materials which union carpenters refuse to handle or install." [52]

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[48] See Chapter I, *supra* p. 28. And see Folsom *v.* Lewis, 208 Mass. 336 (1911).

[49] Bossert *v.* United Brotherhood of Carpenters, 77 Misc. 592 (N. Y., 1912).

[50] Bossert *v.* Dhuy, 166 App. Div. 251 (N. Y., 1914).

[51] Bossert *v.* Dhuy, 221 N. Y. 342 (1917). See Chapter I, *supra* p. 44.

[52] The material part of this text is reprinted with the report of the case, 221 N. Y. 342, 344.

The Auburn decree—granted in March, 1915, and finally affirmed in July, 1919 [53]—thus prohibited the injury of complainant's business: the persons named in the decree were not to "induce . . . any person to quit the service of employers who patronize the plaintiff"; they were not to refuse to handle or work upon any article or material because the plaintiff had worked upon it; they were not to do or threaten "any act whatsoever in pursuance of or for the carrying out or observance of any combination" to injure the plaintiff; they were not to give notice to employers or the public of their intention to do any of the above acts; they were not to discipline union members or others who work upon materials handled by the plaintiff; they were not to circulate statements threatening such discipline; they were not to threaten such discipline.[54]

Two of the remaining cases concern the picket line.[55] In one or both of the resulting decrees, these specific restraints, *inter alia,* were imposed:

1. "parading, marching or congregating in the street near or in the vicinity of the premises of the plaintiff"; [56]
2. "coercing, threatening, assaulting, intimidating and turning aside against their will" workmen or would be workmen or those who "may work" or "any persons desiring to enter the premises"; [57]
3. "following plaintiff's workers", visiting their homes to persuade or

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[53] Auburn Draying Co. *v.* Wardell, 227 N. Y. 1 (1919). See Chapter I, *supra* p. 45.

[54] The text of this decree is found in the record on appeal.

[55] Reed Co. *v.* Whiteman, 238 N. Y. 545 (1924); Exchange Bakery & Restaurant, Inc. *v.* Rifkin, 245 N. Y. 260 (1927).

[56] 238 N. Y. 545, 546-47 (1924). This was modified by the Court of Appeals to: ". . . parading or marching in crowds of more than two in number within one-half mile of the premises of the plaintiff. . . ."

[57] 238 N. Y. 545, 546 (1924). This clause was retained verbatim by the Court of Appeals, *ibid.* 547.

In the Rifkin Case, the words were: approaching, accosting, threatening, assaulting or intimidating any person or persons desiring to enter said premises"; "blockading the entrance to plaintiff's premises"; "causing or instigating crowds to collect in front thereof." This and the later quotations from the Rifkin Case are taken from the text of the order complained of as found in the Record on Appeal, p. 208.

In United Traction Co. *v.* Droogan, 115 Misc. 672, 677-78 (N. Y., 1921), the phrasing was: ". . . by annoying, harassing, ridiculing, threatening, frightening or assaulting . . . or calling them vile or disagreeable names. . . ."

to attempt to persuade them "to leave their employment"; "enticing plaintiff's workers from their employ;"[58]

4. "picketing plaintiff's factory within a radius of three blocks in all directions";[59]

5. "from hampering, hindering, or harassing in any other way the free dispatch of business by the plaintiff";[60]

6. "exhibiting any signs and distributing any notices in front of or in the vicinity of said [plaintiff's] premises";[61]

7. "suggesting to any person or persons the boycotting of plaintiff's business."[62]

The latest labor injunction to come before the New York Court of Appeals was that of *Interborough Rapid Transit Co.* v. *Lavin* granted in December, 1926, in effect until reversed in January, 1928.[63] This decree so elaborately restrained the defendants from inducing the plaintiff's employees to quit work that only the full text can give an adequate conception of its provisions. We reprint it in Appendix VI.

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[58] 238 N. Y. 545, 546-47 (1924). This paragraph was modified by the Court of Appeals as follows: ". . . persuading or inducing or enticing or from attempting to persuade or induce or entice, any employee or employees of the plaintiff to leave its employment before the expiration of any contract of employment for a definite time existing between such employee or employees and the plaintiff. . . ." ". . . endeavoring to persuade such employees or prospective employees against their will to leave or not to enter the employment of the plaintiff. . . ."

In the Rifkin Case, the words were: "accosting, coercing, intimidating, threatening or in any manner interfering with persons employed by plaintiff or seeking to enter its employ from entering or continuing in such employment."

[59] 238 N. Y. 545, 546. This was modified to read: ". . . authorizing, permitting or joining in picketing of plaintiff's premises by more than two individuals at one time, and from authorizing, permitting or joining in the use by such pickets of force, threats, coercion, intimidation, assault or persuasion used against the will of the person addressed, directed against the employees and customers or other persons having business relations with the plaintiff or who may intend or desire to become or to have such relations, or who consider becoming such employees or customers or having such business relations."

In the Rifkin Case, the words were: "patrolling the sidewalk and street in front of or in the vicinity of said premises."

[60] 238 N. Y. 545, 546. This clause was dropped by the Court of Appeals. The Rifkin Case used this clause: "from interfering in any manner with the said business conducted by the plaintiff. . . ."

[61] From the Rifkin Case.

[62] From the Rifkin Case. See Mills *v.* United States Printing Co., 99 App. Div. 605 (N. Y., 1904) where a restraint against "boycotting" was held too broad, the court saying: "I think that the verb 'to boycott' does not necessarily signify that the doers employ violence, intimidation or other unlawful coercive means. . . ." at 611. And also see Butterick Pub. Co. *v.* Typo. Union No. 6, 50 Misc. 1 (N. Y., 1906).

[63] 247 N. Y. 65 (1928), *rev'g* 220 App. Div. 830 (N. Y., 1927).

Since most of the decrees are never appealed, a representative instance of such an injunction should be given. Thus, in 1923, the White Goods Workers' Union was enjoined from picketing, "and all persons connected with them . . . from assaulting, menacing, threatening or intimidating, whether by manner, attitude, speech, numbers or other acts or means" employees or persons who may be "desirous of entering" the plaintiff's employ. The decree further restrained interference with the plaintiff's business "by any unlawful means" for the purpose of inducing the plaintiff's employees to leave his service or of inducing persons who might thereafter desire to enter the plaintiff's employ not to do so. The injunction then elaborated upon the proscribed methods whereby such results were obtained,—"resorting to any species of threats, intimidation, force or fraud"; "expressing or implying a threat, intimidation or coercion"; "picketing by intimidation, threats, force, fraud or defamatory publications"; "stationing themselves along the streets leading to the plaintiff's place of business and by intimidation, threats, force, fraud or defamatory publications inducing or procuring them to quit the employment of the plaintiff." [64]

The most ambitious decrees have always issued from the United States courts. The steady growth of the injunction from a simple order to a complex document, disclosing "an evolution mildly comparable with the growth of the corporate mortgage" [65] is thus best evidenced by the orders of federal judges. The Debs injunction, according to a statement attributed to one of the counsel for the United States,[66] was "intended to be, a veritable dragnet." Whatever the intent in that case, such a result has since been accomplished.

The injunctions that have received the Supreme Court's approval are among the mildest to be found in the federal courts.

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[64] Maegert Undergarment Co., Inc., *v.* White Goods Workers' Union, Local 62 of the Int'l Ladies Garment Workers' Union. N. Y. L. J., Oct. 8, 1923, p. 107, prints the court's opinion but not the injunction.

[65] G. W. Pepper, *Injunctions in Labor Disputes* (1924) 49 A. B. A. REP. 174, 176.

[66] Ardemus Stewart, *The Legal Side of the Strike Question* (1894) 33 AM. LAW REG. 609, 620. Mr. Stewart credits the characterization to the United States Attorney. We have been unable to verify this.

Yet, in one of the latest cases, that against the Tri-City Central Trades Council, where the intermediate appellate court[67] had modified the decree by striking out a restraint against "persuasion", and inserting after a restraint against "picketing" the limitation "in a threatening or intimidating manner", the Supreme Court, sustaining the first modification, reversed the second.[68] The qualification "in a threatening or intimidating manner" was deleted because the word "picketing" conveyed to the Supreme Court a "necessary element of intimidation"[69] and was "clearly understood in the sphere of the controversy by those who are parties to it."[70] The same decree forbade "threats or personal injury, intimidation, suggestion of danger or threats of violence of any kind" and "any acts or things whatever in furtherance of any conspiracy or combination among them."[71] In the *Hitchman Coal Case,* the injunction was directed against "threats, intimidation, violent or abusive language", representing to any employee or potential employee that he "will suffer or is likely to suffer some loss or trouble", and persuasion of employees to "fail or refuse to perform their duties as such."[72] In the *Gompers Case,* the defendants were enjoined from "interfering in any manner with . . . the complainant's . . . business", from "declaring or threatening any boycott", from referring to the complainant as "unfair", from "in any manner whatsoever impeding, obstructing, interfering with or restraining the complainant's business."[73]

Thus the highest court in the federal system sanctions legal restraints couched in terminology of vague and profoundly controversial significance. The trial courts, themselves the originators of this practice, have utilized the Supreme Court's sanction with great fecundity. For the period prior to the Clayton Act of 1914,

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[67] Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1916).

[68] 257 U. S. 184 (1921). The first decree had been severely attacked in the Senate, 51 CONG. REC. 13665 (1914).

[69] 257 U. S. at 207.

[70] *Ibid.* 205.

[71] The text is reprinted in part in the opinion of the Supreme Court, 257 U. S. 184, 193-94 (1921).

[72] The decree is paraphrased in the court's opinion, 245 U. S. 229, 261-62 (1917).

[73] The text of the decree is reprinted in 221 U. S. 418, 420 (1911).

Dr. Witte has furnished a summary of injunction texts.[74] There were restraints upon behavior already illegal by criminal statutes, such as force, violence, intimidation and trespass. There were prohibitions upon the calling and the conduct of strikes; [75] upon picketing, sometimes without qualification, but frequently with such limiting phrases as "for the purpose of inducing by threats, violence or intimidation", "in such a manner as to intimidate", "in such a manner as to interfere with the complainant's business." [76] There were restraints against speech,[77]—"abusive language", "annoying language", "indecent language", "bad language",[78] "opprobrious epithets",—and against specific words such as "scab", "traitor", "unfair". Federal injunctions prohibited persuasion or inducement "in any manner whatsoever" of employees to break their contracts, or to quit work, or of potential employees to refrain from accepting work.[79] They prohibited parading or marching "near to or in the sight of" the complainant's mines; [80] "boycotting" or "conducting a boycott" likewise were restrained. Finally, there were the catch-all clauses—"from doing any and all other acts in furtherance of any conspiracy to prevent the free and unhindered control of the business of the complainants",[81] "generally from in any manner whatsoever interfering with the complainant",[82] "from unlawfully interfering",[83] "from doing all unlawful acts described in the said bill of complaint and the affidavits of the complainants thereto attached." [84]

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[74] Witte, Industrial Comm., Appendix B (1915), see Chapter II, *supra* p, 50, n. 9.

[75] In A. R. Barnes & Co. *v.* Berry, 156 Fed. 72 (S. D. Ohio, 1907), union officers were enjoined from taking a vote on the question of strike and from "counting any such vote and from reporting, writing, telegraphing, or aiding or assisting in any manner, related or connected with the taking, recording, or acting upon such referendum vote." Witte, Industrial Comm., Appendix B (1915) p. 126. This injunction was dissolved in 157 Fed. 883 (S. D. Ohio, 1908) where the court said (at 889): "The court will not by indirect methods compel the men to continue in the service. . . ." And see Wabash R. Co. *v.* Hannahan, 121 Fed. 563 (E. D. Mo., 1903); Delaware, L. & W. R. Co. *v.* Switchmen's Union, 158 Fed. 541 (W. D. N. Y., 1907).

[76] See, *e.g.*, Phillips S. & T. P. Co. *v.* Amalgamated Ass'n of I., S. & T. W., 208 Fed. 335 (S. D. Ohio, 1913); Eagle Glass & Mfg. Co. *v.* Rowe, 245 U. S. 275 (1917).

[77] Compare a later Texas case, *Ex parte* George Tucker, 110 Tex. 335 (1920) when the defendant was discharged upon *habeas corpus* after a conviction for contempt of an injunction against "villifying, abusing, or using opprobrious epithets", on the ground that the injunction was a violation of the state constitution's guaranty of "liberty of speech".

[78] Silence is sometimes found to be a coercive weapon. In Gevas *v.* Greek Restaurant Workers' Club, 99 N. J. Eq. 770, 783 (1926), the court said: ". . . silence is sometimes more striking and impressive than the loud mouthings of the mob." And see Skolny *v.* Hillman, 114 Misc. 571, 579-80 (N. Y., 1921): "It is a silent weapon but carries with it a menacing attitude."

[79] Witte, Industrial Comm., Appendix B (1915), pp. 136-40.

[80] Wheelwright *v.* Haggerty (D. C. W. Va., 1902) House Injunction Hearings, 1904, pp. 36-39. See Jefferson & Indiana Coal Co. *v.* Marks, 287 Pa. 171 (1926)

The Clayton Act, intended to restrict the federal chancellor's power of decretal invention, has apparently served to stimulate it. Certainly, the ambit of restraint has been greatly extended by federal labor injunctions since 1914. Controversies in the coal fields have notably provoked a steady extension of equitable relief. In October, 1919, at the instance of the Attorney General of the United States, Judge A. B. Anderson, of the Federal District Court in Indiana, issued without opinion a remarkable decree forbidding a threatened strike.[85] Officers of the United

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where parades of 75 to 450 strikers, led by a band on the road in the morning when men were going to work, were enjoined.

[81] Houston & Texas Central R. Co. *v.* Machinists (S. D. Texas, 1911), unreported; American Steel Foundries Co. *v.* Tri-City Trades Council, *et al.* (D. C. Ill., June 9, 1914), unreported, but the text of the decree appears in this opinion deciding an appeal therefrom, 238 Fed. 728 (C. C. A. 7th, 1916). Dr. Witte states he "has noticed such clauses in 18 injunctions issued since Jan. 1, 1910 [to 1914], and in above 40 injunctions issued prior to that date;" Witte, *supra* note 79, p. 153.

[82] Sailors' Union of the Pacific *v.* Hammond Lumber Co., 156 Fed. 450 (C. C. A. 9th, 1907); Houston & Texas R. Co. *v.* Machinists (D. C. Texas, Oct. 5, 1911), unreported. Dr. Witte reports: "Blanket clauses prohibiting interference in any manner with the business or property of complainants have occurred in probably more than one-half of all injunctions which have been issued in connection with labor disputes. The writer has a list of above 100 injunctions in which such clauses occurred." Witte, Industrial Comm., Appendix B (1915) p. 155.

[83] Witte, Industrial Comm., Appendix B (1915) pp. 168-69.

[84] Niles-Bement-Pond Co. *v.* Elwell (D. C. Pa., Jan. 31, 1906), Witte, Industrial Comm., Appendix B (1915) p. 170. In Goyette *v.* C. V. Watson Co., 245 Mass. 577 (1923), an injunction against "interfering with the plaintiff's business by threats, patrols, picketing or acts of intimidation was modified by adding the words, "as alleged in the bill and". (at 597.)

[85] U. S. D. C. Ind. Nov. Term, 1919, In Equity, No. 312; Oct. 31, 1919; Nov. 8, 1919. This case is unreported but the bill and temporary restraining order have been printed. (Wash., 1919.) After a hearing, the order was continued as a temporary injunction *pendente lite*. See Hearings on S. 1482 (*supra* note 31), Limiting Scope of Injunctions in Labor Disputes, pp. 516-25. The case is criticized

Mine Workers "and all other persons whomsoever" were restrained from giving any message regarding the strike, from "doing any further act whatsoever", "from issuing any further strike orders", "from issuing any instructions, written or oral", "from issuing any messages of encouragement or exhortation", and from paying strike benefits.[86] In the consolidated group of twelve cases [87] in West Virginia,[88] the temporary injunction restrained the miners "from further maintaining the tent colonies of Mingo County or in the vicinity of the mines of the plaintiffs"; and representatives of the United Mine Workers were further restrained from "furnishing to the inhabitants of said tent colonies or to those who may hereafter inhabit the same, any sum or sums of money, orders for money, merchandise, or orders for merchandise, or any other thing of value. . . ." [89] In October,

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by Professor Chafee in (1921) 34 HARV. L. REV. 388, 401 and supported in (1920) 5 CORN. L. Q. 184.

[86] The text of this decree is reprinted in Hearings on S. 1482 (*supra* note 31), pp. 524-25.

[87] A factor that adds sweep to the injunction is the recent innovation of including a great many complainants in one application for the injunction. In these cases, for example,—to use the court's words,—"Complainants are 316 in number, embracing most of the coal companies operating on a non-union basis in what is known as the Southern West Virginia field." International Organization, *etc. v.* Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927). In Borderland Coal Corp. *v.* International U. M. Workers, 275 Fed. 871 (D. Ind., 1921), the injunctive relief was given not only to the particular complainant, but to 62 other coal operators who did not appear as co-complainants and were not even named in the bill. The Circuit Court of Appeals held the decree was erroneous in not confining the grant of relief to the complainant, saying (Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56, 63 (C. C. A. 7th, 1921)): "We cannot pass in advance upon the right of absent and unidentified operators to join or to be counted as co-complainants. . . ."

[88] International Organization, *etc. v.* Red Jacket C. C. & C. Co., and eleven other cases, 18 F. (2d) 839 (C. C. A. 4th, 1927).

[89] This text from the preliminary injunction, subsequently modified, is reprinted in Hearings on S. 1482 (*supra* note 31) p. 596. In Borderland Coal Corp. *v.* International U. M. Workers, 275 Fed. 871 (D. Ind., 1921), coal operators were enjoined from enforcing check-off promises in their contracts with the United Mine Workers, *i.e.*, "from collecting . . . through their pay rolls . . . any and all moneys as dues and assessments levied . . . by the said United Mine Workers of America . . . upon or against its members, employés of said . . . defendant corporations . . . and from paying the same to the officials, members or representatives of said United Mine Workers of America." The decree is reprinted in 278 Fed. 60, 61. The quoted part of the decree was held to be "substantial error" in Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56, 66 (C. C. A. 7th, 1921).

1927, Judge Schoonmaker, of the Federal District Court in Pennsylvania, enjoined the striking miners (who frequently live in houses owned by the mine owners) [90] "from disbursing any funds for any further appeal bonds, attorney services, court costs, or otherwise for the purpose of enabling, aiding, encouraging or procuring any person to occupy against the plaintiff's will any such mining houses of plaintiff; from signing any further appeal bond or depositing, providing, or furnishing security for such appeal bond to prolong or aid in litigation respecting the possession of said houses. . . ." [91] In September, 1927, Judge Benson W. Hough, of the Federal District Court in Ohio, issued an elabo-

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[90] See CHAFEE, THE INQUIRING MIND (1928) *Company Towns in the Soft-Coal Fields,* 172 *et seq.* From the Report of the UNITED STATES COAL COMMISSION (1925) we take the following: "Thus the position of the miners in company-owned houses is anomalous. They are not tenants and have no more rights than a domestic servant who occupies a room in the household of the employer. The documents which pass for leases often give the company complete control over the social life of the families who live in the houses owned by the company. One which has been called to the commission's attention from Fayette County, Pa., actually stipulated that the lessee 'hereby further agrees not to use, allow, suffer, or permit the use of said premises . . . for any purpose other than going in to said premises . . . and out . . . by himself and the members of his family; and further, to do no act or thing . . . whereby the public or any person or persons whomsoever may be invited or allowed to go or trespass upon said premises or upon said private ways or roads, or upon other grounds of the lessor, except physicians attending the lessee and his family; teamsters or draymen moving lessee and his family belongings . . . and undertakers with hearse, carriages and drivers, and friends, in case of death of the lessee or any member of his family'." Vol. 1, p. 169-70.

[91] Pittsburgh Terminal Coal Corp. *v.* United Mine Workers of America, No. 1909 Equity, 1927 (D. C. W. D. Pa.) unreported. The text of the decree is reprinted in Hearings on S. 1482 (*supra* note 31) p. 407. See, for a statement justifying this order, Hearings on S. 1482 (*supra* note 31) pp. 385, 394.

The Senate investigation into the bituminous strike brought out details concerning an injunction issued by Judge Langham of the Pennsylvania State Court September, 1927, made permanent July 24, 1928. The order, reprinted in Hearings on S. 1482 (*supra* note 31) p. 599, restrained the striking miners "from congregating on the Magyar Presbyterian Church lot, or any other lot, lots, place or places at the time the employees of the plaintiff enter the mine and at the time the employees of the plaintiff come out of the mine, from singing song or songs in hearing of the employees of the plaintiff of a threatening or hostile nature." The pertinent abstract from the Senate sub-Committee's report to the full committee follows:—

> "Mr. Musser [vice president and general manager of the complainant corporation] was then asked just how far the church and the lots, in and upon which the singing had been prohibited by the injunction, were located from

rate temporary decree which he ordered to be printed "in the English, Italian and Polish languages" and widely disseminated. It contained the conventional phrases of prohibition,—"threats by acts or words", "menacing, threatening, or insulting manner", "intimidating or creating fear". But it improved upon past precedents. Thus, "Persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion and is hereby prohibited"; the strikers may meet but their meet-

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the company's property. Mr. Musser replied that the distance was about 1,500 feet from where the men had to pass to go to and from the mines.

"Mr. Musser further said, 'the people are not restrained from congregating on that particular lot alone but on all other lots. It so happens that those are the only lots and the only surface which we do not own and on which they could congregate and from which point they could see the operation down here by means of field glasses. It is across this ravine here, and they can see men going in and out, and by singing whatever it was, it was intended to intimidate our men.'

"The committee found so much bitterness in its tour of inspection through the coal fields of Pennsylvania against Judge Langham's injunction, especially that part prohibiting the singing on property owned by the local union at Rossiter, that they decided to visit the church to try and find out just what manner of hymns the miners had been enjoined from singing.

"The committee, accompanied by Vice President and General Manager Musser, Superintendent Welsh, of the Clearfield Bituminous Coal Co., and Messrs. Murray, Fagan, and Mark of the United Mine Workers of America, proceeded to the church on the ground where the miners had been enjoined from singing hymns.

"Your committee found the church crowded with union miners and proceeded at once to interview Rev. A. J. Phillips. Reverend Phillips was asked to give the title of the hymns that were sung in the open by the miners and was asked to sing some of them.

"The first hymn was No. 166 entitled 'The Victory May Depend on You.'

"The next hymn was No. 66 entitled 'Sound the Battle Cry.' The next hymn was No. 266 entitled 'Nearer my God to Thee.'

"The committee then listened to the singing of hymn No. 44 'Stand up for Jesus.'

"Reverend Phillips admitted that they had changed the title of hymn No. 10 from 'I'm on the Winning Side' to 'We are on the Winning Side.' This was the only hymn that was changed, the committee was advised.

"Reverend Phillips said he was a regularly ordained minister of the Church of God, having its headquarters at Anderson, Ind.

"The committee then adjourned to the grounds back of the church where these hymns had been sung, from which point they could view the offices of the coal company and the entrance to the mine, and it was considered very doubtful by the committee that the singing could be heard so as to distinguish the words of the song in the company's office, unless the winds were very favorable." *U. S. Daily*, March 13, 1928, p. 12.

ings "shall not be conducted with the purpose or effect of violating the provisions or the spirit of this injunction"; and each of the strictly limited number of pickets "shall be a citizen of the United States, and shall be able to speak the English language".[92] Concerning the significance of the last requirement of this injunction (the full text of which is set forth in Appendix V), the President of the American Federation of Labor thus testified before a United States Senate Committee: ". . . more than 90 per cent of the workers in these mines in eastern Ohio were foreign-speaking men . . ."[93]

Examples testifying to the Spencerian evolution of federal injunctions are not restricted to the coal industry. Controversies in other industries supply testimony equally striking. The injunction issued by Judge Wilkerson in the Railway Shopmen's strike in 1922 is a landmark in the history of American equity; not being easily accessible, it is reprinted in Appendix IV. Injunctions have issued against strikes[94] and against the payment of strike benefits.[95] Union officials have been restrained from calling or instigating strikes, from rendering assistance to strikers or workmen about to go on strike,[96] and have been commanded to call off an effective strike.[97] Strikers have been enjoined from all persuasion, from peaceful paroling, from attempts to give publicity to the facts of a dispute.[98] Characteristic of the labor injunction throughout its wide employment by the federal courts is the use of restraining clauses of vague and harassing significance.[99]

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[92] Clarkson Coal Mining Co. *v.* United Mine Workers (D. C. Ohio, Sept. 1927) unreported. The text of the decree is reprinted in Hearings on S. 1482 (*supra* note 31) p. 553. The quoted portions appear on pages 554, 555, 556. Concerning the so-called eviction order of Judge Hough (23 F. (2d) 208) and in defense thereof, see a memorandum by complainants' attorneys reprinted in Hearings on S. 1482 (*supra* note 31) pp. 548-50.

[93] Hearings on S. 1482 (*supra* note 31) p. 70. The following excerpt from the testimony is illuminating:

> "*Sen. Norris.* Do you happen to know whether the persons that the picket would come in contact with, the employees who took their place, were the same kind of people?
>
> "*Mr. Green.* Many of them. . . . For instance, Italians are brought in from Detroit in large numbers and they speak the Italian language. They don't understand English. . . . These Italians come in, Senator; the picket must be an English-speaking person, he must be a citizen of the United States. He can not speak to these Italians in their own language, and the Italian member of the union is prohibited from doing so by the court order." (p. 71.)

Cf. Pritchard, J., in Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed. 685, 699 (C. C. A. 4th, 1914): "Statistics show that over a million foreigners land on our shores annually, a majority of whom, owing to their former environments, are not capable of understanding and appreciating what it means to be an American citizen. . . . That this class of labor, a vast number of whom are unable to read and write or understand our language, can secure a more substantial recognition of their rights as members of a labor union is undoubtedly true, and so long as these people are among us for the purpose of earning a living and thereby improving their condition, and at the same time adding to the wealth of our country, it is the duty of this government to afford them equal protection under our Constitution and the laws passed in pursuance thereof."

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[94] In Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993 (N. D. Ill., 1924), *aff'd* 6 F. (2d) 444 (C. C. A. 7th, 1925), the defendants were enjoined ". . . from striking or threatening to strike against any person, firm or corporation for the purpose of inducing such person, firm or corporation to stop or prevent complainant working on his, their or its premises, and thereby of preventing said plaintiff from performing its contracts . . . and of compelling it to discharge its employees who are not members of labor unions which are affiliated with said defendants." Hearings on S. 1482 (*supra* note 31) p. 112.

Lubliner & Trinz Theatres, Inc. *v.* Chicago Fed. of Musicians, *et al.* (N. D. Ill., Sept. 1928) unreported, restrained employees "From leaving or threatening to leave the employment of said complainant, either by way of strike or otherwise, unless with the consent of said complainant, for the purpose of forcing, or coercing said complainant to agree to . . . said demands or any of them. . . ." The parties came to an agreement two days before the date set for the hearing on the preliminary injunction.

[95] In United States *v.* Railway Employés' Dept., A. F. L., 286 Fed. 228 (N. D. Ill., 1923), the restraint was against "Using, or causing to be used, or consenting to the use of any of the funds or moneys of said labor organization in aid of or to promote or encourage the doing of any of the matters or things hereinbefore restrained and enjoined." Hearings on S. 1482 (*supra* note 31) p. 113.

[96] See Portland Terminal Co. *v.* Foss, 283 Fed. 204 (D. Maine, 1922), dissolved in 287 Fed. 33 (C. C. A. 1st, 1923); Indianapolis Street Ry. Co. *v.* Armstrong (D. Ind., 1926), Hearings on S. 1482 (*supra* note 31) pp. 232-33; Decorative Stone Co. *v.* Building Trades Council, 18 F. (2d) 333 (S. D. N. Y., 1927).

[97] Selden Breck Construction Co. *v.* Blair (N. D. Ohio, Sept. 2, 1925), Hearings on S. 1482 (*supra* note 31) p. 109; Selden-Breck Construction Co. *v.* Local No. 253, 7 LAW AND LABOR 302 (D. Neb., Sept. 11, 1925).

[98] In Bedford Co. *v.* Stone Cutters Assn, pursuant to the opinion and mandate of the Supreme Court, 274 U. S. 37 (1927), the District Court of Indiana entered a decree in part, restraining,

"(e) From giving notice, verbally or in writing, to any person, firm, or corporation to refrain from soliciting, making, or carrying out contracts with complainants, or any of them. . . .

"(f) From publishing, circulating, or otherwise communicating, either directly or indirectly, in writing or orally, to each other, or to any other person, firm, or corporation, any statement or notice of any kind or character whatsoever, intimating . . . that the complainants are, or were, or have been unfair. . . ." This decree is reprinted in Hearings on S. 1482 (*supra* note 31) p. 49. Similar restrictions against the giving of publicity to strikes will be found in Waitresses' Union, Local No. 249 *et al.* *v.* Benish Restaurant Co., Inc., 6 F. (2d) 568 (C.

JUDICIAL CORRECTIVES

A presentation of the chancellors' patterns so cinematographic as is here attempted necessarily omits much for a full understanding of the sweep and magnitude of the injunction as it has been used in industrial controversies.[100] To supply this omission in some measure, we have appended to this volume representative injunctions issued by the courts of the United States, of New York, and of Massachusetts. Some conclusions are justified even by the summarized material. Concerning the content of the injunctions, three observations naturally offer themselves. Many of the activities restrained are punishable independently as crimes. Others, while not so punishable, constitute torts actionable at law, however doubtful their vindication in damages may be. The blanket wording of numerous clauses frequently includes the residuum of conduct even remotely calculated to have effect in the dispute, but neither criminal nor tortious. This raises the far-reaching question whether first principles of justice, no less than

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C. A. 8th, 1925); Toledo Transfer Co. *v.* Inter. Brotherhood of Teamsters, 7 LAW AND LABOR 33 (N. D. Ohio, Dec. 1924).

In the so-called Chicago Injunction Case, referred to and reproduced in a marginal note to the opinion in Cohen *v.* United States, 295 Fed. 633, 636 (C. C. A. 6th, 1924), the text was as follows: "In any manner, with intent to further said conspiracy, by letters, printed or other circulars, telegrams, telephones, word of month [sic], oral persuasion, or communication, or through interviews published in newspapers, or other similar acts, encouraging, directing, or commanding any person, whether a member of any or either of said labor organizations or associations defendant herein, to abandon the employment of said railway companies, or any of them, or to refrain from entering the service of said railway companies, or any of them."

[99] *E.g.*, Allen A. Company *v.* Steele, *et al.* (E. D. Wis., Mar. 7, 1928) restrained: "Doing any act or thing in furtherance of any conspiracy or combination among the defendants or any of them to obstruct or interfere with the plaintiff . . . in the free and unrestrained control of its property, plant or business." For a recent instance of an injunction containing "some very broad prohibitions against aiding" a strike, see Minerich *v.* United States, 29 F. (2d) 565 (C. C. A. 6th, 1928).

[100] Extracts from many injunction orders are collected in OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927), Appendix G, p. 1124. A short collection of injunction texts, largely unavailable elsewhere, appears in Hearings on S. 1482 (*supra* note 31) pp. 108-18.

of equity procedure, are not infringed in failing to inform the defendants "and all persons whomsoever" precisely what it is they are forbidden to do.[101] And two remarks may be made concerning the form of the injunction. Phrases, and sometimes whole paragraphs, are stereotyped and transferred *verbatim* from case to case, without considered application by the court to the peculiar facts of each controversy.[102] The language is prolix, implying a rhetorical theory that repetition of jargon makes for meaning.[103]

The substance of these observations, at times in language charged with bitterness,[104] has frequently been urged against equity practice in labor disputes. To make the infraction of a criminal statute also a contempt of court is essentially an invention to evade the safeguards of criminal procedure and to change the tribunal for determining guilt.[105] To sanction vague and undefined terminology in "drag-net" clauses largely unenforceable, and certainly unenforced,[106] is to distort the injunction into a

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[101] In Swift and Company *v.* United States, 196 U. S. 375, 396 (1905), Holmes, J., said: ". . . we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law."

[102] Walworth, C., in Laurie *v.* Laurie, 9 Paige 234, 235 (N. Y., 1841), said: "As the defendant is bound to obey the process of the court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of injunction. And the language of the writ should at the same time be so restricted as not to deprive him of any rights which the case made by the bill does not require that he should be restrained from exercising."

[103] Amidon, J., in Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 415 (D. N. Dak., 1923): "Neither the restraining order nor the preliminary injunction prepared by counsel was signed by the court. During the 30 years that courts have been dealing with strikes by means of injunctions, these orders have steadily grown in length, complexity, and the vehemence of their rhetoric. They are full of the rich vocabulary of synonyms which is a part of our English language. They are also replete with superlative words and the superlative phrases of which the legal mind is fond. The result has been that such writs have steadily become more and more complex and prolix. All of this, it seems to me, is foreign to their legitimate purpose. They, like the proper bill in such cases, ought to arise out of the facts of each specific case. Injunctions are addressed to laymen. They ought to be so brief and plain that laymen can understand them. They ought to be framed in the fewest possible words. The order should not express the bias or violence of a party to such a controversy or his attorney. I therefore framed the orders in this case with these objects in view. The purpose ought to be to state the specific acts that are forbidden. It also helps to show where the line separating wrong from right conduct lies, to state what acts are not forbidden. So I attempted to do that in the orders that were issued. . . . The result has been that the strikers have been able to understand the orders, and have shown a keen desire to do so and obey them."

[104] See generally, Chapter II, *supra* p. 52, n. 19.

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[105] S. S. Gregory, in his address as President of the American Bar Association in (1912) 37 A. B. A. Rep. 255, 266: "To say that the commission of an offence against the laws of the United States or at common law may be enjoined, and then the person charged with the commission of that offence may be tried upon information for contempt without a jury, is a clear evasion of these salutary constitutional guarantees. When such evasions are countenanced in the effort to reach those not actually guilty, but supposed to be constructively involved and at the instance of the strong and powerful and against the humbler orders of society, it is not remarkable that there is a loss of popular confidence in, and sympathy with, all the departments of government.

"We thus keep the constitutional word of promise to the ear but break it to the hope. . . .

"The real question involved is whether trial by jury shall be retained in all essentially criminal prosecutions in the federal courts.

"Where the law prohibits an act, the effect of enjoining against its commission is merely to change the procedure by which the guilt of the person charged with doing the act thus prohibited shall be ascertained and his punishment fixed. By enjoining against the commission of crime and then proceeding on a charge of contempt against those accused of committing it, the administration of the criminal law is transferred to equity and the right to trial by jury and all other guarantees of personal liberty, secured by the constitution, are *pro hac vice* destroyed."

[106] Dr. E. E. Witte, in his report to the United States Industrial Commission (Witte, *supra* note 79) makes this statement regarding the cases up to 1914: "Rarely, if ever, are contempt cases based upon the blanket clauses like 'or in any other manner interfering with the business of the said complainants', which have occurred in most injunctions issued in connection with labor disputes. The writer knows of no case in which a contempt prosecution was frankly based upon these general clauses." (p. 191)

We have noticed one such instance in the cases since 1914, Schwartz *v.* United States, 217 Fed. 866, 867 (C. C. A. 4th, 1914): "The charge against Schwartz seems to fall under the italicized portion of the following provision of the order:

> 'From interfering in any manner whatsoever, either by threats, violence, intimidation, persuasion, or entreaty . . . and *from ordering, aiding, directing, assisting, or abetting, in any manner whatsoever, any person or persons to commit any or either of the acts aforesaid.*'

"By petition filed November 11, 1913, the plaintiff alleged:

> 'Meyer Schwartz, who keeps a store near your petitioner's Locust Grove mine, after being advised of the terms and provisions of the said restraining order, has continued to furnish a meeting place for your petitioner's striking employés, and to assist in inducing your petitioner's striking employés to

"scarecrow"[107] device for curbing the economic pressure of the strike and thereby to discredit equity's function in law enforcement. To approve decrees that in form are like the idiot's tale, "full of sound and fury, signifying nothing", each decree the replica of another and usually the partisan phrasing of counsel,[108] but in substance compendia of legal rules purporting minutely to regulate conduct, is to rest faith in a cabala.

These criticisms have not been unheeded by the courts. They have denied the central accusation that the injunction is the exclusive weapon of one side of the industrial controversy. Unions have themselves invoked the injunction, although the instances are few and sporadic.[109] Massachusetts discloses a number of

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remain away from their work, in violation of their respective contracts of employment.' "

[107] Judge Dickson, in Morton *v.* Brotherhood of Painters, 13 Ohio N. P. 311, 312 (1912): "It is not proper for a court to violate the law to prevent the law being violated. The court should not permit itself to be used as a scarecrow. It is not wise for a court to make an order which it can not carry out; indeed, it has no power so to do. . . . This court is not a police court. . . . This court will not permit the employer or the employe to terrorize the other, nor will it permit either to obtain any writ for the mere purpose of terrorizing any one."

[108] See Wilkerson, J., in United States *v.* Railway Employees' Dept. of A. F. of L., 290 Fed. 978, 983 (N. D. Ill., 1923): "Counsel for complainant have submitted a draft of a decree for a permanent injunction, whose provisions are the same in all substantial respects as those of the temporary injunction." To the same effect, see Rocky Mountain Bell Tel. Co. *v.* Montana F. of L., 156 Fed. 809, 822 (D. Mont., 1907); Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993, 995 (N. D. Ill., 1924). But *cf.* Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901) where the reporter's annotation to the case (at 58) was as follows: "When the reading of the opinion had been finished, Judge HAMMOND said he would order the decree submitted by Mr. Poston, counsel for the railroad company, to issue against the defendants, with one important change. He had read it very carefully, he said, and almost microscopically. As drawn by Mr. Poston, it was a general, sweeping decree, whereas he thought the relief sought should be from the commission of specific acts charged in the bill, and changed it accordingly." And see quotation from Judge Amidon in Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 415 (D. N. Dak., 1923) *supra* note 103.

[109] A successful attempt by strikers to restrain the police from interfering with the use and occupancy of the union headquarters is reported in (1928) 10 LAW AND LABOR 48, from a district court in Colorado (Jan. 4, 1928). For recent examples of federal injunction suits by a local district union against its parent organization, see McNichols *v.* International Typographical Union, 21 F. (2d) 497 (C. C. A. 7th, 1927); Howard *v.* Weissman, 31 F. (2d) 689 (C. C. A. 7th, 1929).

Perhaps the earliest example provided by the federal courts is Boyer *et al.* *v.* Western Union Tel. Co., 124 Fed. 246 (E. D. Mo., 1903) when a bill to restrain controversies between rival local unions, affiliated respectively with rival national unions, wherein the injunction was sought by the "in" union to restrain the "out" union from inducing employers to violate a collective agreement made with the "ins" regulating the conditions of employment; [110] or contrariwise, the injunction was sought by the "outs" to restrain the fulfillment of such an agreement.[111] In two such cases, even in the absence of such an agreement, the "ins" restrained the "outs" from making threats of strikes or boycotts against employers of members of the complainant union.[112] In New York, *Schlesinger* v. *Quinto* [113] registers the first important appeal by a union for equity's help in a trade controversy. In the suit of the International Ladies' Garment Workers' Union, the Appellate Division of New York affirmed a temporary injunction restraining an employers' association from "ordering, directing, instigating, counselling, advising or encouraging such members [of the said association] to abrogate and discontinue" agreements between the association members and the plaintiff union for the regulation of conditions of employment. In sustaining the injunction the court said:

> "The cases thus far decided have been at the suit of the employer against combinations of labor, for the simple reason that this is the first time that labor has appealed to the courts . . . the law does not

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the employer from discharging members of the plaintiff union was dismissed upon demurrer. See Wood and Coleman, Don't Tread on Me (1928), for an analysis of legal resources available to labor when taking the offensive.

[110] Tracey *v.* Osborne, 226 Mass. 25 (1917); Goyette *v.* C. V. Watson Co., 245 Mass. 577 (1923). And see Nann *v.* Raimist (N. Y. L. J., Feb. 4, 1928, p. 2188) where the complainant union procured an injunction restraining a rival union "and its members from in any way interfering with the conduct of the business of any bakery, confectionery or shop having a contract with plaintiff union and from in any manner interfering with members of plaintiff union against his will and from intimidating or threatening in any way any member of the plaintiff union . . . or those having contracts with it. . . ." Reported also in (1928) 10 Law and Labor 64.

[111] Hoban *v.* Dempsey, 217 Mass. 166 (1914).

[112] Plant *v.* Woods, 176 Mass. 492 (1900); Bogni *v.* Perotti, 224 Mass. 152 (1916). There are also cases where single non-union employees sought to restrain the union from enforcing a closed shop agreement, DeMinico *v.* Craig, 207 Mass. 593 (1911). *Cf.* Nat. Protective Assn. *v.* Cumming, 170 N. Y. 315 (1902); United Cloak & Suit Designers Mut. Aid Assn. *v.* Sigman, 218 App. Div. 367 (N. Y., 1926). See *Trying Peaceful Persuasion on Trade Unionists* (1928) 10 Law and Labor 112.

[113] 201 App. Div. 487 (N. Y., 1922).

have one rule for the employer and another for the employee. In a court of justice they stand on an exact equality; each case to be decided upon the same principles of law impartially applied to the facts of the case irrespective of the personality of the litigants."[114]

The most significant instance of the use of the injunction by labor has arisen under the Railway Labor Act of 1926.[115] This legislation set up an elaborate system for adjusting labor controversies on interstate railroads. Section 2 of that Act provided:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

To insure that "in the settlement of these disputes each side shall be represented by those of its own selection, uninfluenced by the action of the other",[116] Judge Hutcheson, of the Federal

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[114] *Ibid.* at 498. In this case, Mr. Justice Dowling dissented, saying (at 501): "If power is to be given to the courts to interfere in industrial disputes, to determine the responsibility for their existence and to declare who is in the right therein . . . the grant of such power should be by legislative action alone. The wisdom of such a grant of power has heretofore been vigorously denied, particularly by the representatives of the employed. . . ."

Another case of like import is Goldman *v.* Cohen, 222 App. Div. 631 (N. Y., 1928) which modified and affirmed such an injunction. The injunction is reprinted in (1928) 10 LAW AND LABOR 63; see also *ibid.* 207. But an application by a union to restrain a lock-out was denied in Moran *v.* Lasette, 221 App. Div. 118 (N. Y., 1927), Mr. Justice Proskauer saying for the court (at 121): "The interference of a court of equity in labor disputes directed either against employer or laborer should be exercised sparingly and with caution." See Carpenters' Union *v.* Citizens Committee, 333 Ill. 225 (1928) for a successful injunction suit by a trade-union against a citizens' committee seeking to coerce employers not to employ union carpenters.

An *ex parte* order restraining a lock-out by the Building Trade Employers' Association was issued by the Supreme Court of New York May 14, 1929, *N. Y. Times,* May 15, 1929, p. 1, col. 3, and after a hearing on May 17, was continued for ten days, *N. Y. Evening Post,* May 17, 1929, p. 2, col. 4. On May 22, Justice Crain announced that the Employers' Association had withdrawn its lock-out order and that the union withdrew its bill for an injunction, an amicable settlement of the controversy having been reached, *N. Y. Times,* May 23, 1929, p. 3.

[115] 44 STAT. pt. 2, 577, 45 U. S. C., c. 7. See Chapter I, *supra,* p. 7, n. 31. This Act has been recently construed in Atchison, T. and S. F. Ry. Co. *v.* Brotherhood of L. F. and E., 26 F. (2d) 413 (C. C. A. 7th, 1928).

[116] This language is from the court's opinion in granting the injunction. That opinion is unreported (except a summary of it in (1927) 9 LAW AND LABOR 243),

District Court in Texas, restrained a railroad from controlling its employees through a company union—an organization of the men fostered and dominated by the railroad. Contempt proceedings resulted in the following:

> ". . . a remedial order should be entered, completely disestablishing the Association of Clerical Employees, as now constituted through the action of the defendant, as representative of their fellows, and reestablishing the Brotherhood as such representative, until by a proper ballot the employees, without dictation or interference, vote otherwise, such order to further provide for the restoration to their positions and privileges of the officers of the Brotherhood. . . ."[117]

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but these words are reprinted in a note to the contempt proceedings growing out of this injunction, Brotherhood of Ry. and S. S. Clerks, *etc. v.* Texas & N. O. R. Co., 24 F. (2d) 426, 427 (S. D. Tex., 1928), 25 F. (2d) 873, *ibid.* 876, *aff'd* 33 F. (2d) 13 (C. C. A. 5th, 1929).

[117] 24 F. (2d) at 434. The full text of the order is printed in (1928) 10 LAW AND LABOR 70.

Another interesting application for equitable relief, but one which was denied, is Nolan *v.* Farmington Shoe-Mfg. Co., 25 F. (2d) 906 (D. Mass., 1928). Union members had contracted with their union that they would "not enter into or sign any individual contract of employment" which provides that they "will not become or remain members of the Shoe Workers' Protective Unions. . . ." The defendant employer required his employees, members of the complainant union, to agree to "do nothing to change the status of my fellow workmen, nor will I aid or assist in any manner any person to make said Farmington Shoe Mfg. Co. or its employees conduct work under any other than an open shop basis." See also Howard *v.* Weissmann, 31 F. (2d) 689 (C. C. A. 7th, 1929).

The problem of "company unions" has come much to the fore in the United States in recent years. For a valuable discussion, see the brief of the defendants in Interborough Rapid Transit Co. *v.* Green (N. Y. County, Feb. 1928), published by the American Federation of Labor. And see an address by Charles M. Schwab before the American Society of Mechanical Engineers, Dec. 5, 1927, *Human Engineering*, reprinted in (1928) 10 LAW AND LABOR 14. See Note, *Effect of the Railway Labor Act of 1926 upon Company Unions* (1928) 42 HARV. L. REV. 108.

Cf., however, Abraham Epstein, *Is American Capital Intelligent?* (1929) 16 AMERICAN MERCURY 46, 50: "Students of American labor are beginning to feel that one of the best training schools for a more militant trade-unionism is the company union. Instances of these unions calling strikes and seeking affiliation with the regular labor movement have already occurred. The well known company union of the Colorado Fuel and Iron Company went out on strike in sympathy with the national strikes of the steel workers and miners. Last spring, the workers' representatives of the work's council of the Tidewater Oil Company of Bayonne, N. J., called out the 2,200 employés on a strike, got the promise of other company union heads that they would not handle Tidewater Oil, picketed the plants as aggressively as any regular union, won five of their seven demands, and compelled the company to promise in writing that no one would be dis-

The vague inclusiveness of the blanket injunction has troubled courts. By many it has been helplessly regarded as an inherent characteristic of the remedy. Such courts sometimes suggest as a glossary for words like "intimidation", "coercion" or "picketing", the recitals of misconduct by defendants in the bill of complaint.[118] The scope of the decree is said to be coextensive with the allegations of the bill, its supporting affidavits or findings of fact.[119] In other words, the acts enjoined are the acts alleged in the bill as the basis for complaint. But the injunction is binding upon all who have knowledge of it,[120] while the bill of complaint is served only upon the parties named as defendants. One court has suggested a criterion even more elusive for defining the scope of relief. The terms of a decree were said to be "commensurate with the exigencies of the situation." [121] Judges act on the conviction that it is "impossible, as well as impracticable, for the court in advance to specify all the acts and things which shall or may constitute intimidation or coercion." [122] "This must be left", we are told, "to the wisdom and intelligence of respondents." [123] The guide to wisdom vouchsafed the respondents in this sphere of conduct was this: ". . . every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating." [124] Likewise the Supreme Court, as we have noted, rejected an attempt to qualify the word "picketing" because, "its meaning is clearly understood in the sphere of the controversy by those who are parties to it".[125]

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missed for striking. Some months ago the company union of a Canadian plant applied in a body to the American Federation of Labor for a charter." And see Hardman, American Labor Dynamics (1928) c. XI, *Harnessing the Company's Union,* and c. XX, *The Challenge of Company-Made Unionism.*

See Chapter I, p. 37 and Chapter IV, p. 149.

[118] Goyette *v.* C. V. Watson Co., 245 Mass. 577 (1923); Walton Lunch Co. *v.* Kearney, 236 Mass. 310 (1920); Sailors' Union of the Pacific *v.* Hammond Lumber Co., 156 Fed. 450 (C. C. A. 9th, 1907).

[119] Hotel & Railroad News Co. *v.* Clark, 243 Mass. 317 (1922).

[120] See "Enforcement of the Injunction," *infra* p. 123.

[121] Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264 (N. D. Ill., 1901). The court added (at 268), "To do so will work no hardship, nor will it even hamper the actions of any law-abiding person."

[122] Union Pac. R. Co. *v.* Ruef, 120 Fed. 102, 129 (D. Neb., 1902).

[123] *Ibid.* 129.

[124] *Ibid.* 121.

[125] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 205 (1921).

Such experience as is recorded in law reports indicates that "wisdom and intelligence" of defendants are not fair reliances for assuring meaning to words with such variable content as those current in American labor injunctions. Proceedings for contempt of an injunction squarely raise issues as to the meaning of a decree. It becomes a matter of grave moment whether the injunction proscribed the acts prosecuted as contempt. The decisions reveal the hazards of forecasting how judges will apply the terms of an injunction. Where a picket-line expressly permitted by the injunction had been "systematically, constantly, and long maintained", the prohibition against "intimidation" "mainly by coercion" was held to have been violated.[126] Where a tradesman, in no way connected with the strike, displayed a placard in his window bearing "No Scabs Wanted In Here", he was found guilty of contempt of an injunction against "abusing, intimidating, molesting, annoying or insulting." [127] The word "scab", said the court, "is one of the most opprobrious and insulting in the English language." [128] For justification, the court looked into Webster's Dictionary.[129] But the same source did not serve another Circuit Court of Appeals, when a newspaper article which characterized strike-breakers as "dirty scabs", "scavengers", "snakes", and "traitors", was held not to violate a decree against

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[126] Allis-Chalmers Co. *v.* Iron Molders' Union No. 125, 150 Fed. 155, 180 (E. D. Wis., 1906). See Otis Steel Co. *v.* Local Union No. 218, 110 Fed. 698, 702 (N. D. Ohio, 1901). See two notes, *Nebulous Injunctions,* (1920) 19 MICH. L. REV. 83, (1924) 23 *ibid.* 53.

[127] United States *v.* Taliaferro, 290 Fed. 214, 216 (W. D. Va., 1922), *aff'd* 290 Fed. 906 (C. C. A. 4th, 1923).

[128] *Ibid.* 218. The court added: "No man can be called a scab without thought of the putrescent and loathsome object which the term applied to himself suggests. . . . Even judges are not justified in refusing to act on knowledge which is common to practically all sane and adult inhabitants of the United States."

[129] *Ibid.* 218: "One of the common literal meanings is (Webster's Internat'l Dict., Ed. 1922):

> 'An incrustation over a sore or pustule formed by the drying up of the discharge from the diseased part.'

"Other and less literal, but (in times of strike) extremely common, meanings are:

> 'A dirty, paltry fellow.
>
> 'A workman who works for lower wages than, or under conditions contrary to, those prescribed by the trade union; also, one who takes the place of a workman on a strike; a rat; used opprobriously by trade unionists.'

Webster's Dict. 1922."

"jeering at or insulting the employees of plaintiff or molesting them." [130] A dictionary is not enough,[131] evidently, to save strikers from putting their course of conduct at the peril of a conviction for contempt.[132]

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[130] Cohen *v.* United States, 295 Fed. 633, 634 (C. C. A. 6th, 1924).

[131] *Cf.* Michaels *v.* Hillman, 111 Misc. 284 (N. Y., 1920) when a restraint against the calling of "scab" was held proper, with Wood Mowing & Reaping M. Co. *v.* Toohey, 114 Misc. 185, 190-91 (N. Y., 1921), where this was said: "I cannot feel myself shocked by that word [scab]. The law, although perhaps, deprecating its use, is not so sensitive as to be outraged by it. The word is coarse and offensive, to be sure, but it carries with it no import of infamy or crime. Its meaning is perfectly well known and its use is very common. Webster gives this definition of the word: 'A working man who works for lower wages than, or under conditions contrary to, those prescribed by the trade union; also, one who takes the place of a working man on a strike.' This definition embraces no thought of violence, no infraction of the law, no threat, no menace. Why should this word be especially tabooed? It is offensive, beyond question, and perhaps opprobrious. It would be better unsaid, but why should the court enjoin the strikers from using this particular word, or enjoin them from anything because they have used it? There is no reason, as I comprehend the rules of equity."

An Illinois case, Vulcan Detinning Co. *v.* St. Clair, 315 Ill. 40, 42 (1924), restrained ". . . calling any of [the plaintiff's] said employees 'scabs' or other offensive, scurrilous or opprobrious names." A union notice in the daily newspaper referred to the new employees as "traitors" and added (at 43): "No red-blooded man will steal a real man's job." The lower court held this to be a violation of the injunction, but was reversed. The upper court said (at 46): "The Standard Dictionary says that a traitor is 'anyone who acts deceitfully and falsely to his friends and joins their enemies.' . . . Therefore . . . we do not consider that the order was violated."

In *Ex parte* Richards, 117 Fed. 658 (S. D. W. Va., 1902), the court said (at 666): "As to what constitutes intimidation, and consequently acts violative of the court's order, the answer will largely be governed by the circumstances." Examples are cited by the court (at 666-67): "'A simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employés in the performance of their duties, is not less obnoxious than the use of physical force for the same purpose. A "request" under such circumstances is a direct threat and an intimidation, and will be punished as such.' In re Doolittle (C. C.) 23 Fed. 545." A union "chairman" sent the following notice to the various shop foremen: "'Foremen: You are hereby requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employés. But in no case are you to consider this an intimidation. . . .' In re Wabash R. Co. (C. C.) 24 Fed. 217". This was held a contempt of court.

[132] See Mackall *v.* Ratchford, 82 Fed. 41 (D. W. Va., 1897); Schwartz *v.* United States, 217 Fed. 866 (C. C. A. 4th, 1914).

In this connection Kroger Grocery & B. Co. *v.* Retail Clerks' I. P. Ass'n, 250 Fed. 890 (E. D. Mo., 1918) may be noted, when the name "Kaiser" was held

Some courts have been alert to mitigate these difficulties. They began by ordering modification[133] of decrees whose phrasing might cover lawful[134] activities or purely hypothetical mis-

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to be "insulting language, and intimidation." Said the court (at 893): "One man was called 'Kaiser', and while, ordinarily, that could hardly be deemed an insulting term, yet, considering the conditions now prevailing in the minds of the public towards the Emperor of Germany, who is generally alluded to as 'the Kaiser', we know it was intended as a term of insult, and not of commendation."

Courts have been careful in other types of litigation not to subject the entire conduct of defendants to the risks of disobeying a vague injunction. In a litigation under the Sherman Law, Mr. Justice Holmes applied this principle: "The defendants ought to be informed as accurately as the case permits what they are forbidden to do. . . . The words quoted are a sweeping injunction to obey the law. . . ." Swift and Company *v.* United States, 196 U. S. 375, 401 (1905). And see White, J., in New Haven R. R. *v.* Interstate Com. Com., 200 U. S. 361, 404 (1906). *Cf.* also Lord Cottenham, L. C., in Cother *v.* The Midland Ry. Co., 17 L. J. Eq. (N. S.) 235, 236 (1848): ". . . the injunction therefore only prohibits the company from doing what they have no authority to do, without informing them what are the limits of such authority, that is, leaving the question between the parties undecided, but to be discussed on a motion for breach of the injunction." And see *supra* notes 94-99.

Judge B. W. Hough of the Federal District Court, the author of the Ohio coal strike injunction of 1927, is thus reported in a newspaper interview: "Judge Hough was queried first regarding his interdiction of the words 'scab', 'rat', and 'yellow dog'. He was told that the union read the injunction as implying a jail sentence should a miner be heard using any of the three appellations.

"There are 'certain common expressions in the vocabulary of miners on strike', he replied. 'They have a perfect right to use them when mixed up in ordinary conversation. In the form of a threat or as preparatory to an assault, it is not permitted.'

"'Who is going to tell the difference?' he was asked.

"'I am,' said Judge Hough." Reprinted in Hearings on S. 1482 (1928) 629 *et seq.*

[133] Another method of attaining the result is by petition for *supersedeas* pending appeal. The court may suspend the injunction until its further order, except in certain stated particulars. Barring these excepted particulars, the injunction continues. See Patton *v.* United States, 228 Fed. 812 (C. C. A. 4th, 1923).

[134] Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908); Plant *v.* Woods, 176 Mass. 492 (1900); Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1916), modified in 257 U. S. 184, 207 (1921); Grassi Contracting Co. *v.* Bennett, 174 App. Div. 244, 253 (1916). See *In re* Heffron, 179 Mo. App. 639 (1913). The view has sometimes been expressed that where violence has been practised, the defendants forfeit whatever claim they have to be permitted to continue their strike along peaceful lines. United States *v.* Railway Employees' Dept. of A. F. of L., 290 Fed. 978 (N. D. Ill., 1923); Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264 (N. D. Ill., 1901); Vegelahn *v.* Guntner, 167 Mass. 92 (1896); Keuffel & Esser *v.* Inter. Asso. Machinists, 93 N. J. Eq. 429 (1922).

conduct.[135] If by the term "persuasion" duress is intended, duress and not persuasion should be restrained; if under cover of picketing, violence is used, violence, not picketing should be enjoined.[136] For, "the vice of the injunctive order lies in the fact that this word, unqualified, may signify a lawful act." [137] And so, an injunction against "all unlawful interferences" was modified because "it leaves the door open for controversy, both as to what is interference and as to what is unlawful." [138] Interfering

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In Daitch & Co., Inc. *v.* Retail Grocery & D. C. Union, 129 Misc. 343, 344-45 (N. Y., 1927), counsel for the defendants requested the court to rule upon the permissibility of peaceful picketing. The request was denied, the court saying: "The court should not be required to render a decision upon an hypothesis. . . . If defendants desire authority for the supposititious problem which they present with so much earnestness and enthusiasm, they may find it in the case of *Public Baking Co.* v. *Stern* (127 Misc. 229). . . ."

But *cf.* Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45, 49 (C. C. A. 7th, 1908), where Judge Baker said: ". . . surely men are not to be denied the right to pursue a legitimate end in a legitimate way, simply because they may have overstepped the mark and trespassed upon the rights of their adversary. A barrier at the line, with punishment and damages for having crossed, is all that the adversary is entitled to ask."

[135] Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56 (C. C. A. 7th, 1921) when the court said (at 63): "But no injunction, preliminary or final, should forbid more than the particular unlawful invasions which the court finds would be committed except for the restraint imposed." See Aberthaw Construction Co. *v.* Cameron, 194 Mass. 208 (1907); Hotel & Railroad News Co. *v.* Clark, 243 Mass. 317 (1922); Goyette *v.* C. V. Watson Co., 245 Mass. 577 (1923). And see New Haven R. R. *v.* Interstate Com. Com., 200 U. S. 361, 404 (1906).

In Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 262 (1917), the prevailing opinion stated: "But it [the decree] goes further, and awards an injunction against picketing and against acts of physical violence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction. . . ."

In Grassi Contracting Co. *v.* Bennett, 174 App. Div. 244, 253 (N. Y., 1916), Laughlin, J., said: "The injunction granted, however, is altogether too broad, and is warranted neither by the facts nor the law. Among other things it, in effect, enjoins the defendants generally from soliciting or inducing plaintiff's employees by any species of threats . . . or by any unlawful 'or other means' to leave the employ of the plaintiff, and from publishing in any manner that plaintiff's business has been blacklisted. . . . There is no evidence that the defendant has threatened or intends to do any of these things. . . . The injunction order should, therefore, be modified. . . ."

[136] Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45, 51 (C. C. A. 7th, 1908).

[137] Mills *v.* United States Printing Co., 99 App. Div. 605, 609 (N. Y., 1904).

[138] King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257, 259 (C. C. A. 6th, 1920). But

"in any way",[139] "in any wise interfering",[140] "boycotting" are among the phrases which have, at times, been found too indefinite or too inclusive.[141] A restraint against "unionization" has been confined to "the threatened direct and immediate interfering acts shown by the bill and affidavits." [142] Though federal judges have frequently overlooked the importance of being specific in decrees, Congress embodied this requirement in the Clayton Act.[143] The rationale of specific restraints has been well put by a district court:

> "The court's order is to restrain defendants from exceeding the bounds of the Clayton Act, but not to intimidate them from enjoying all within those bounds. In the exercise of the rights that the Clayton Act assures to defendants, they may go to the very line between the lawful and the unlawful, carefully avoiding crossing into forbidden territory.
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> "So may any person in the exercise of any right; and all because no right can be maintained, but by its fearless, vigorous, and full enjoyment." [144]

More recently, courts have felt the need of giving affirmative indications that their decrees were not meant to paralyze all those activities which alone give validity to the abstract right to strike. What was permitted, as well as what was forbidden,

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see Stephens *v.* Ohio State Telephone Co., 240 Fed. 759, 776 (N. D. Ohio, 1917) where interference "in any respect with the performance of the duties and obligations of the defendant company as a common carrier" was held to be "as definite as it is possible to make it."

[139] Michaels *v.* Hillman, 111 Misc. 284, 286 (N. Y., 1920); Wyckoff Amusement Co., Inc., *v.* Kaplan, 183 App. Div. 205 (N. Y., 1918).

[140] Pierce *v.* Stablemen's Union, 156 Cal. 70, 72 (1909).

[141] Mills *v.* United States Printing Co., 99 App. Div. 605 (N. Y., 1904).

[142] Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56, 66 (C. C. A. 7th, 1921), modifying Borderland Coal Corp. *v.* International U. M. Workers, 275 Fed. 871 (D. Ind., 1921).

[143] Act of Oct. 15, 1914, 38 STAT. 738, 28 U. S. C., § 383: "every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained. . . ." The statute was referred to in King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257, 260 (C. C. A. 6th, 1920); Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557, 561 (D. Mont., 1922). But see Stephens *v.* Ohio State Telephone Co., 240 Fed. 759, 776 (N. D. Ohio, 1917).

[144] Bourquin, J., in Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557, 561 (D. Mont., 1922).

began to find a place in decrees. Rather early, a *nisi prius* judge suggested that pickets wear badges so as to be distinguishable. This was characterized by another judge in proceedings to punish for contempt of that same injunction, as a "mere extrajudicial suggestion for what it might be worth".[145] Such "suggestions", advising striking employees what they may do, are gradually finding their way into injunctions. The Supreme Court,[146] some lower federal courts,[147] and some state courts have under-

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[145] Allis-Chalmers Co. *v.* Iron Molders' Union No. 125, 150 Fed. 155, 162 (E. D. Wis., 1906). The strange result of this suggestion was that the wearing of badges by the pickets was used by the court in contempt proceedings as an additional proof of coercion. Said the court (at 180): "While the use of these buttons was suggested by the court when granting the injunction . . . they have . . . much increased the efficiency and pressure of the coercion. These buttons, like the uniform of the soldier, are emblems of a mysterious and powerful organized authority, and greatly increased the potency of the picket line."

[146] Amer. Foundries *v.* Tri-City Council, 257 U. S. 184 (1921) (modifying the decision reported in 238 Fed. 728), where the Chief Justice said (at 206-07): "Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it .We think that the strikers . . . should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating . . . that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps."

[147] A federal decision exemplary in this respect is Bittner *v.* West Virginia-Pittsburgh Coal Co., 214 Fed. 716, 717-18 (C. C. A. 4th, 1914): "The court below granted a preliminary injunction restraining the defendants from committing acts of violence, intimidation, and coercion, and also from the use of persuasion and other peaceable methods, and from aiding the striking miners by furnishing them money from what was known as a relief fund, etc. The defendants made a motion to modify the decree in so far as it restrained them from resorting to persuasive and peaceable methods, and from aiding the striking miners by furnishing them money. This motion was disallowed, and the case comes here on appeal. . . .

"It follows that the decree of the lower court should be modified by adding thereto the following proviso:

"Provided, however, that this restraining order is not intended to prevent any of said employés of the plaintiff company from quitting work for said plaintiff and from severing the relations of master and servant existing between the plaintiff and said employés at the time this order is entered, or from striking or persuading his fellow employés to quit work and strike for their mutual protection and benefit.

"Provided, further, that this injunction is not intended to prevent any employé taken to define in detail[148] the number of pickets permitted,[149] where they are to be stationed, and what they may do[150] and say.[151] In the same way, courts of review have increasingly

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of the plaintiff who had ceased to work for said plaintiff to use persuasion, but not violence, to prevent other men from accepting employment with the plaintiff in his place.

"Provided, further, that this injunction is not intended to prevent the employés of plaintiff from joining any lawful labor union and from receiving the non-employment benefits paid by such union.

"Provided, further, that this injunction is not intended to prevent the defendants, their associates, agents, and fellow members of the United Mine Workers from supporting any of plaintiff's former employés who have ceased to work for said plaintiff, nor is this injunction intended to prevent any member of the labor union to which such employés ceasing to work for the plaintiff belong from legally assisting said employé in securing better terms of employment and in endeavoring to persuade, without violence, any other laborer from taking the place of said striking employé." And see Bittner *v.* West Virginia-Pittsburgh Coal Co., 15 F. (2d) 652, 659 (C. C. A. 4th, 1926). *Cf.* International Organization, *etc.* *v.* Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927); Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 415 (D. N. Dak., 1923).

[148] Reed Co. *v.* Whiteman, 238 N. Y. 545 (1924); La France Co. *v.* Electrical Workers, 108 Oh. St. 61 (1923); Berg Auto Trunk & Specialty Co. *v.* Wiener, 121 Misc. 796 (N. Y., 1923); Eureka Foundry Co. *v.* Lehker, 13 Ohio Dec. (10 N. P.) 398 (1902); Greenfield *v.* Central Labor Council, 192 Pac. 783 (Ore., 1920).

[149] Permitting picketing by one man at each entrance, Berg Auto Trunk & Specialty Co. *v.* Wiener, 121 Misc. 796 (N. Y., 1923). No more than six pickets at the plaintiff's main entrance and four at each of the side entrances, Rentner *v.* Sigman, 126 Misc. 781 (N. Y., 1926), *rev'd* in 216 App. Div. 407 (N. Y., 1926). For an order limiting the number of pickets to four, and requiring them to be registered, see Snead *v.* Local No. 7, Int'l Molders' U., (1928) 10 LAW AND LABOR 232.

In Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557, 565 (D. Mont., 1922), the court avoided detail saying that the "guide" must be what is "reasonable and only persuasive".

[150] Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 424 (D. N. Dak., 1923), where the decree provided: "A small tent may be erected at or near any point at which such pickets are stationed to protect them from the weather while they are on duty; but there must not be present at any such tent at any single time any one but the pickets who are there on duty. It is to be used by them and not by others."

For a statutory adoption of this device, see L. of New Jersey 1926, c. 207, providing that "No restraining order or writ of injunction shall be granted . . . enjoining . . . any person or persons . . . to peaceably and without threats or intimidation persuade any person to work or abstain from working . . . *provided said persons remain separated one from the other at intervals of ten paces or more*" (Italics ours.)

[151] Robinson *v.* H. & R. E. Local No. 782, 35 Ida. 418 (1922); Bittner *v.* West Virginia-Pittsburgh Coal Co., 15 F. (2d) 652 (C. C. A. 4th, 1926).

added provisos to injunctions as originally issued in order to make clear what is not forbidden to the strikers.[152]

One other marked turn in the moulding of labor decrees must be noted. The practice long prevalent in large industries of hiring armed private "police", ostensibly to guard property and the strike-breakers,[153] has aroused the criticism of two federal judges.

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[152] In Bittner *v.* West Virginia-Pittsburgh Coal Co., 15 F. (2d) 652, 659 (C. C. A. 4th, 1926), the court added this modification: "'Provided, that nothing herein contained shall be construed to forbid the advocacy of union membership, in public speeches or by the publication or circulation of arguments, when such speeches or arguments are free from threats and other devices to intimidate, and from attempts to persuade the complainant's employés or any of them to violate their contracts with it.'"

In Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993, 995 (N. D. Ill., 1924), a decree against striking was qualified in this way: "'Nothing herein shall be construed to prohibit any employee from voluntarily ceasing work unless said act is in furtherance of the conspiracy charged in the bill herein to prevent plaintiff from performing its contracts . . . and to compel plaintiff to discharge employees who are not members of labor unions. . . .'"

In Butterick Pub. Co. *v.* Typo. Union No. 6, 50 Misc. 1, 8 (N. Y., 1906), the court said: "The defendants are free, with these exceptions, however, and within the limits already indicated, to make any requests or give any advice or resort to any persuasion for the purpose of winning support; and in so far as the preliminary injunction is inconsistent herewith it is vacated." Also see to same effect, Searle Manufacturing Co. *v.* Terry, 56 Misc. 265, 271 (N. Y., 1905) where the injunction was so modified as not "to prevent the defendants . . . from peacefully picketing, in reasonable numbers, for the purpose of observation only, the plaintiff's premises from the highways or streets in its vicinity and endeavoring by argument, persuasion or appeal only, to prevent other persons from becoming employees of plaintiff and from peaceably assembling at any place or places in the city of Troy." See, too, Newton Co. *v.* Erickson, 70 Misc. 291 (N. Y., 1911).

[153] Chapter II *supra* pp. 71-72, nn. 92-95.

The appointment of special police at the instance of private individuals and corporations for the purpose of preservation of private property is authorized by law in a large number of states. Nominally appointed by the governor or other executive official, these police are paid by the persons whose property they protect. For statutes dealing with this situation, see Cal. Sims Penal Code, 1906, p. 652; Conn. Gen. Stat., 1918, §§ 80-81; Fla. L., 1921, c. 8539; Ind. Gen. L., 1925, c. 159; Md. Ann. Code, 1911, §§ 406-410 of Art. 23; Mass. Rev. L., 1902, §§ 11-24, c. 108; N. Mexico L., 1921, c. 141; N. Car. Code, 1905, §§ 2605-2610; N. Dak. Rev. Code, 1905, §§ 9750-9751; N. Y. L., 1910, c. 481, § 88, amended by N. Y. L., 1926, c. 198; Nev. Stat., 1921, c. 163; Ohio Code, 1910, §§ 1738-1739; Pa. Stat., 1920, §§ 18542-18548 and amendment to § 18548 by Pa. L., 1925, Act No. 214; Pa. L., 1929, Act No. 243; S. Car. Civ. Code, 1912, § 1149; Vermont Gen. L., § 5258; W. Va. Code, 1899, c. 145, § 31; Wis. Stat., 1927, § 192.75. That such police are deemed public servants rather than private, see St. Louis Southwestern Ry. Co. *v.* Hudson, 286 S. W. 766 (1926).

These armed guards are themselves promoters of violence.[154] Judge Bourquin speaks with intimate knowledge of the mining camps in Montana:

> "Force and violence are strangers to neither party to strikes, and either may give a Herrin for a Ludlow. The parties forget that aggression incites retaliation, and violence breeds violence. Then, too, the pickets of one are generally confronted, if not overawed, by armed guards of the other, and by police, sheriffs, and marshals, who too often forget they are public officers, with duty to protect both

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[154] For an illustrative situation, see the testimnoy before the N. Y. Industrial Survey Commission taken from a news report in the *N. Y. Sun,* July 20, 1927:

"Lehman had been called to testify about the difficulties of the union in maintaining a picket line around the Exchange Bakery and Restaurant at Twenty-first street and Sixth avenue, where a strike has been in progress for two and a half years.

"In the course of the testimony of a previous witness, Julius Metzger, a member of the adjustment board of Local No. 1 had had occasion to mention the notorious 'Dopey Benny' Fein, who seems to be playing a familiar rôle in this unusual one-shop strike.

"Last Saturday, Metzger said, while he was supervising two women pickets he was approached by 'Dopey Benny' and told 'in a nice way' that if he didn't keep off the picket line the speaker would 'blind' him.

" 'I've got a wife and four children,' Metzger told the commission, 'and "Dopey Benny" just had to warn me once. I haven't been back there since.'

"He said that Dopey Benny, who has been notorious as a gangster for perhaps fifteen years, told him he was in the employ of Isie Stampler, proprietor of the restaurant. When the strike first began, Stampler obtained an injunction that stopped picketing, but a decision of the Appellate Division of the Supreme Court, reversing the lower court, started picketing again recently.

"The union official threatened with 'blinding' and the gangster who makes threats in such a nice way appear to have carried on quite a pleasant conversation before they called it a day."

See the *History of a Criminal Conspiracy Against Union Workers—Lawless Methods of Employers Uncovered through Court Records* by John P. Frey, reprinted in Senate Hearings on H. R. 23635, 62d Cong., 2d Sess., Aug. 13, 1912, pp. 981-92; and see *semble,* testimony of Mr. Gompers, pp. 1072-86 as to some activities of private detective agencies.

For a further description of the activities of coal and iron police in Pennsylvania, written by one of the victims, see Woltman and Munn, *Cossacks* (1928) 15 AMERICAN MERCURY 399; *The Shame of Pennsylvania, The War on the Colorado Miners,* pamphlets published in 1928 by the American Civil Liberties Union; *The Coal Strike in Western Pennsylvania,* a report on conditions by the Federal Council of Churches; *The Denial of Civil Liberties in the Coal Fields,* W. D. Lane (1924); *Pennsylvania's Cossacks and the State Police,* by John P. Guyer (a member of Governor Pinchot's Police Investigation Commission) (1924).

parties, and mistakenly assume they are partisans of one party or the other."[155]

Judge Amidon's carefully drafted injunction in one of the Railway Shopmen Strike Cases[156] remains the pioneer in defining restraints also upon the conduct of the injunction-seeker.[157] After enumerating the forbidden and permitted activities of the defendants, that decree provided that so long as the strikers confined themselves to an orderly exercise of their specified rights, "the plaintiff, its officers, agents, employés and guards are enjoined from interfering with them, and particularly——

"1. From using towards them threatening or abusive language or epithets.

"2. From inflicting upon them any personal injuries or attempting to do so.

"3. The armed guards of plaintiff are enjoined specifically from drawing or exhibiting firearms or other dangerous weapons, for the purpose of intimidating such pickets, and from using firearms or other dangerous weapons at all except in the presence of imminent peril such as threatens very serious injury to the person of the party using such weapons, or others in the employ of the company, or to resist the imminent and immediate danger of the destruction of personal property . . . and on such occasions from using said firearms or other dangerous weapons when there is any other reasonable means of preventing the aforesaid wrongful acts."[158]

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[155] Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557, 562 (D. Mont., 1922).

[156] Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414 (D. N. Dak., 1923). The court said (at 418): "The impartial history of strikes teaches that there is as much danger to strikers on the picket line from private detectives and sometimes from new employés, as there is of the same kind of wrong on the part of strikers against new employés. . . . The strikers on the picket line are entitled to have enough present to shield them against the temptation of their adversaries to resort to violent methods. They also need the same protection against trumped-up charges or unfair evidence relative to any assaults that may occur on either side."

[157] Judge Bourquin also emphasized this need (Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557, 561 (D. Mont., 1922)): "They [defendants] are equally entitled to receive from the court protection against intimidation, and any order of restraint, though in terms directed to one party alone, even as any like order in any suit, imposes correlative restraint upon the other. Its office is protection, and not a shelter for aggression."

[158] Reprinted in Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 424-25 (D. N. Dak., 1923). And see Consolidated Coal & Coke Co. *v.* Beale, 282 Fed.

ENFORCEMENT OF THE INJUNCTION

Verbally, at least, as we have seen, the injunction is designed to include within its sweep of prohibitions "all persons whomsoever". The whole world is asked to pay heed. To what extent is it bound to do so? Parties to the suit, persons named and served, their agents and employees—of these there is no doubt in all jurisdictions.[159] Injunctions against representatives of a class bind the class.[160] And one who knowingly assists a person named in the injunction to violate it may be held in contempt.[161] But this does not exhaust the range of responsibility. All who have knowledge of a decree must obey it.[162] Actual notice proven in any way is enough.[163] Publicity is the only limit to the injunc-

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934 (S. D. Ohio, 1922) where the court declined on application to extend protection to the petitioner's property in advance of any acts amounting to contempt of the injunction.

[159] See Wimpy *v.* Phinizy, 68 Ga. 188 (1881); People *ex rel.* Empire Leasing Co. *v.* Mecca R. Co., 174 App. Div. 384 (N. Y., 1916); (1910) 23 L. R. A. 1295 (N. S.); (1921) 15 A. L. R. 389 collects many cases.

Furthermore, it has been held that officers of a union are obligated to prevent their members from committing contempts or at least to exert reasonable efforts in that direction and to enforce stringent discipline. Union Pac. R. Co. *v.* Ruef, 120 Fed. 102 (D. Neb., 1902); United Traction Co. *v.* Droogan, 115 Misc. 672 (N. Y., 1921).

[160] Supreme Tribe of Ben-Hur *v.* Cauble, 255 U. S. 356, 366 (1921): "Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree." See Berger *v.* Superior Court of Sacramento County, 175 Cal. 719 (1917).

[161] But such persons would be guilty of contempt even if the injunction did not restrain them in terms. See the old case, Lord Wellesley *v.* Earl of Mornington, 11 Beav. 181 (1848), and *In re* Rice, 181 Fed. 217 (M. D. Ala., 1910).

[162] American Steel & Wire Co. *v.* Wire Drawers', *etc.*, Unions, 90 Fed. 598 (N. D. Ohio, 1898), where the court said (at 604): "And it is one of the features of an interlocutory injunction that it reaches all who are parties, whether they have been served with process of subpoena or not, whether they have appeared or not, whether they have answered or not; and it binds all who have notice of it, whether they are parties or not. It is old as the practice of injunctions that all having notice of it must obey it. If not parties to the suit, they aid or abet those who are, if the injunction be violated by those who know of it."

See People *ex rel.* Stearns *v.* Marr, 181 N. Y. 463 (1905); Borden's Farm Pro. Co., Inc. *v.* Sterbinsky, 117 Misc. 585 (N. Y., 1922); (1921) 15 A. L. R. 393, collects cases on the responsibility of individuals not themselves parties to an injunction suit, but having relationship to, or concert with, the parties specifically enjoined.

[163] *In re* Lennon, 166 U. S. 548 (1897); Toledo, A. A. & N. M. Ry. Co. *v.*

tion's authority.[164] As a consequence, the complainant uses every available device to spread knowledge of the decree. The injunction is printed, sometimes in all the languages prevalent in the community, distributed by deputy marshals, posted in conspicuous places throughout the city or county,[165] published in

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Pennsylvania Co., 54 Fed. 746 (N. D. Ohio, 1893); McCourtney *v.* United States, 291 Fed. 497 (C. C. A. 8th, 1923); Garrigan *v.* United States, 163 Fed. 16 (C. C. A. 7th, 1908), *certiorari* denied, 214 U. S. 514 (1909); Bessette *v.* W. B. Conkey Co., 194 U. S. 324, 326, 330 (1904); Matter of Christensen Engineering Co., 194 U. S. 458, 459 (1904); Pope Motor Car Co. *v.* Keegan, 150 Fed. 148, 151 (N. D. Ohio, 1906).

One difference between the two classes of persons was that a conviction for contempt of a party was not reviewable by writ of error; but a conviction of one not a party to the suit was so reviewable. Bessette *v.* W. B. Conkey Co., 194 U. S. 324, 330 (1904); International Paper Co. *v.* Chaloux, 165 Fed. 436 (C. C. A. 1st, 1908); Nassau Electric R. Co. *v.* Sprague Electric Ry. & Motor Co., 95 Fed. 415 (C. C. A. 2nd, 1899).

The injunction was held not to be binding upon persons not parties to the record in Oxley Stave Co. *v.* Coopers' International Union, 72 Fed. 695 (D. Kan., 1896); Charleston Dry Dock & Machine Co. *v.* O'Rourke, 274 Fed. 811 (E. D. S. Car., 1921); Pickett *v.* Walsh, 192 Mass. 572 (1906); Reynolds *v.* Davis, 198 Mass. 294 (1908). And it was held in Corcoran *v.* National Telephone Co., 175 Fed. 761 (C. C. A. 4th, 1909) that the injunction will not issue against persons who merely have expressed sympathy with the strikers.

Injunctions have been dissolved as to innocent parties defendant. Butterick Pub. Co. *v.* Typo. Union No. 6, 50 Misc. 1 (N. Y., 1906); Irving *v.* Neal, 209 Fed. 471 (S. D. N. Y., 1913); Pope Motor Car Co. *v.* Keegan, 150 Fed. 148 (N. D. Ohio, 1906).

[164] But a judge of an Ohio Superior Court in the unreported case of Fullworth Garment Co. *v.* Internat. Ladies' Garment Workers *et al.,* said: "An action for an injunction is a proceeding *in personam* and we do not believe that a court has the moral right to lay its restraining hand upon one who may never have heard of the controversy which is before the court, who may never have participated in the acts which are the objects of its animadversion and who had no opportunity to defend himself against the imputation which would thus be made to rest upon him." Witte, Industrial Comm., Appendix B. (1915) p. 109.

[165] The Bill of Complaint in the Railway Shopmen's Strike of 1922 prayed, in part, the following relief: ". . . and that for the purpose of bringing notice or knowledge thereof to such unknown and unnamed defendants the said temporary restraining order be ordered and directed to be published and posted in such manner and in such places and at such times as the court may direct, and that immediately upon the posting or publishing of such temporary restraining order in any locality on any of the said lines of railroad where employees are accustomed to perform the works of inspection and repair of the locomotives, cars, or other equipment, all such unknown and unnamed defendants in such locality should be deemed to have notice and knowledge thereof and become bound thereby." Bill of Complaint, filed Sept. 1, 1922, Government Printing Office.

newspapers of general circulation,[166] and mailed to all possible offenders.[167] Some, or all of these measures for publicity have at times been expressly ordered by courts in their decrees.[168] Given knowledge of the injunction,[169] the tradesman who exhibited a notice "No Scabs Wanted In Here",[170] and the newspaper publisher who characterized strike-breakers as "dirty scabs",[171] though otherwise completely outside the area of contention, were held to be within the class of persons subject to attachment for contempt.

To the "standing injunction" of the criminal law[172] there is thus added another compendium of restrictions upon the freedom of speech and action of "all persons whomsoever". The imminent threat of irreparable harm to property, the basis of the chancellor's restraint upon the conduct of the person who actually so threatened,[173] does service against all persons, indefinable and undefined, who might subsequently injure or threaten to injure the congeries of interest protected as complainant's "property". A particular controversy between particular parties—which is the limited sphere of judicial power—is made the occasion for a code of conduct governing the whole community.[174]

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[166] Employers' Teaming Co. *v.* Teamsters' Joint Council, 141 Fed. 679 (N. D. Ill., 1905). But such publication was held to be insufficient proof of notice, at least with respect to others than direct participants in the strike. Garrigan *v.* United States, 163 Fed. 16 (C. C. A. 7th, 1908). See, however, *Ex parte* Richards, 117 Fed. 658 (S. D. W. Va., 1902).

[167] "It is further ordered that a copy of this preliminary injunction shall be mailed to each of the defendants and to all persons known to be acting with them, at his present address, in so far as such address can reasonably be ascertained. . . . " Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 425 (D. N. Dak., 1923).

[168] In Clarkson Coal Mining Co. *et al.* *v.* United Mine Workers of America *et al.* (D. Ohio, Sept. 1927), the decree provided: "12. It is further ordered that the marshal cause this preliminary injunction to be published in a newspaper of general circulation in each of the following counties of Ohio, to wit: . . . for at least one issue and that he causes this order . . . to be printed in the English, Italian and Polish languages, and to be posted in at least 25 conspicuous places in each of said counties . . . and all persons are forbidden under the penalty of contempt of this court from destroying, defacing, or mutilating any such poster wherever the same is being lawfully displayed." This decree appears in Hearings on S. 1482 (*supra* note 31) 553-56 and is reprinted *infra* in Appendix V. The final injunction in the Tri-City Case (257 U. S. 184) decreed "that the complainant shall cause not less than One Hundred printed copies of this Final Decree to be posted in conspicuous places about and in the vicinity of its said plant. . . ." (From Transcript of Record in the Circuit Court of Appeals for the 7th Circuit.) Many other examples are cited in Witte, Industrial Comm., Appendix B. (1915) pp. 114-19; Otis Steel Co. *v.* Local Union No. 218, 110 Fed. 698 (N. D. Ohio, 1901); Southern Ry. Co. *v.* Machinists' Local Union, 111 Fed. 49 (W. D. Tenn., 1901); Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264 (N. D. Ill., 1901).

[169] As to sufficiency of notice of the injunction, see cases collected in (1921) 15 A. L. R. at 400.

[170] Taliaferro *v.* United States, 290 Fed. 906 (C. C. A. 4th, 1923) *rev'g* decision reported in 290 Fed. 214 (W. D. Va., 1922).

[171] Cohen *v.* United States, 295 Fed. 633 (C. C. A. 6th, 1924). And see Lawson *v.* United States, 297 Fed. 418 (C. C. A. 8th, 1924) where the chief of police was convicted on a finding that he aided and abetted an assault in his presence by standing by and failing to protect the persons assaulted.

[172] "The Penal Law is a standing injunction against crime. . . . If the defend-

Violation of the injunction, whether it be of the final decree, temporary injunction or restraining order[175] is, of course, a contempt of court.[176] An injunction continues in force so long as the controversy that evoked it remains unsettled.[177] Contempt

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ants are committing crime, the quick, summary, regular remedy is arrest and prosecution." Wood Mowing & Reaping M. Co. *v.* Toohey, 114 Misc. 185, 196 (N. Y., 1921).

[173] See Chapter I, *supra* p. 22.

[174] Again to quote from Mr. Dunbar: "Courts of equity, like courts of law, are established for the determination of controversies between individuals. The power to issue preliminary injunctions is incidental to the power of determining such controversies. The right to lay down general rules for the government of the community, to declare *ex cathedra,* in advance of any contentious proceedings in which the question arises, what may and what may not lawfully be done, to impose on the whole community a duty to refrain from doing a certain act, is in its nature a legislative right." Dunbar, *Government by Injunction* (1897) 13 L. Q. REV. 347, 362.

[175] Tosh *v.* West Kentucky Coal Co., 252 Fed. 44 (C. C. A. 6th, 1918); Lawson *v.* United States, 297 Fed. 418 (C. C. A. 8th, 1924).

[176] See N. Y. Judiciary Law, § 750; 28 U. S. C. §§ 385, 386; 36 STAT. 1163 (1911); 38 STAT. 738 (1914).

[177] In Tosh *v.* West Kentucky Coal Co., 252 Fed. 44 (C. C. A. 6th, 1918), error was brought to reverse a conviction for a contempt alleged to have occurred in 1917, of an injunction that had been issued in 1907. The conviction was reversed, with directions to dismiss proceedings. The court's discussion is of interest. It said, in part (at 50-51): "If the injunction of 1907 is of its own force applicable to new conditions in 1917, no reason appears why it would not be applicable to conditions 20 years, or even 30 years, after the decree is entered, provided the union which was back of the attempted unionizing of the mines in 1907, out of which the injunction grew, was also back of the new and independent attempt to unionize the mines 20 or 30 years later. Under such circumstances the recognition of the power of summary prosecution for contempt, without previous adjudication that the existing conditions are such as to justify injunction, especially where the remedy is sought to be exercised, not through the public officers, but by the employer alone, and primarily on behalf of its private interests, is fraught with great possibilities for oppression." And see

involves not only an infringement of the private rights of litigants but also a flouting of the court's authority. Proceedings for contempt may seek indemnity for disobedience or vindication of the judiciary.[178] This dual aspect of contempt has led to much opaque discussion in opinions and legal literature concerning the true "nature" of contempt of the ordinary labor injunction. In its "nature" is it a "criminal contempt" [179] or "civil contempt?" [180] This discussion as to "nature" need not detain us; [181] the Massachusetts Court has wisely characterized the distinction as resting "in shadow".[182] Suffice it that the contempt concerns both plaintiff and court, and that petitions in contempt proceedings may press the interest of either or both.[183] If the

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Bittner *v.* West Virginia-Pittsburgh Coal Co., 15 F. (2d) 652 (C. C. A. 4th, 1926).

[178] In Bessette *v.* W. B. Conkey Co., 194 U. S. 324, 329 (1904), the court said of the contempt proceeding: "It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."

[179] Rugg, C. J., in Root *v.* MacDonald, 260 Mass. 344, 357 (1927), said: "The use of the word 'criminal' in connection with contempts has sometimes been deprecated and is not strictly accurate, because numerous incidents of criminal trials are inapplicable to trials for contempt. People *v.* Court of Oyer & Terminer, 101 N. Y. 245."

[180] The few cases that summarize and review the whole of American experience with this problem are the following: Gompers *v.* United States, 233 U. S. 604 (1914); Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 (1911); Michaelson *v.* United States, 266 U. S. 42 (1924); *Ex parte* Grossman, 267 U. S. 87 (1925); People *ex rel.* Stearns *v.* Marr, 181 N. Y. 463 (1905); Root *v.* MacDonald, 260 Mass. 344 (1927). See Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161. And see the material referred to in Chapter II, *supra* pp. 58-59, nn. 42-46.

[181] In Myers *v.* United States, 264 U. S. 95, 103 (1924), the court said: ". . . contempt proceedings . . . are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions." See also the Massachusetts Court in New York Central Railroad *v.* Ayer, 253 Mass. 122, 129 (1925): "Whatever else may be said about proceedings for contempt, it is plain that they are *sui generis* in their nature and not strictly either civil or criminal, as those terms commonly are used."

[182] Rugg, C. J., in Root *v.* MacDonald, 260 Mass. at 358 (1927): "At best the line of demarcation between contempts civil and contempts criminal in character is difficult to state with accuracy, and in close cases rests in shadow."

[183] See United States *v.* Bittner, 11 F. (2d) 93, 95 (C. C. A. 4th, 1926), where the court decided the proceeding was one for criminal contempt, because "It was so characterized by the petitioners in their original petition. . . ."

aim is recompense for injury to property, the guilty defendant will be fined for the benefit of the aggrieved.[184] The burden of proof, the rules of evidence and the measure of damages will be drawn from the customary practice in civil litigation.[185] But if to this civil claim is united a vindication of the court's majesty, or that alone is sought, "the criminal feature is regarded as dominant",[186] and fixes the character of the trial.

In Massachusetts and New York, such a criminal proceeding is generally instituted by the complainant in the original injunction suit.[187] In the federal courts, the formalities differ. Upon "the return of a proper officer" or "upon the affidavit of some credible person", the judge issues an order to show cause, and if on the return date the contempt is not purged, the court orders a trial.[188] In New York [189] and in the federal courts,[190] the respective governments are the nominal prosecutors; normally, counsel for complainants direct the prosecution. The procedural incidents of trials for criminal contempt, the rules of evidence, the discretionary power of the trial judge and the ambit of appeal[191] from a conviction[192] have been considered in a previous chapter.[193] Here we need only recall the admonition of the present Chief Justice:

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[184] See N. Y. Judiciary Law, § 773; Eastern C. S. Co. *v.* B. & M. P. I. U. Local No. 45, 200 App. Div. 714 (N. Y., 1922). But, apparently, costs will not be allowed against the defendants, People *ex rel.* Stearns *v.* Marr, 181 N. Y. 463 (1905). See Root *v.* MacDonald, 260 Mass. 344 (1927) and cases collected in Campbell *v.* Justices of the Superior Court, 187 Mass. 509, 512, 513 (1905). 28 U. S. C., § 387 provides: "Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may . . . be divided or apportioned among them as the court may direct." See Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 444 (1911) where it was said, "The only possible remedial relief for such disobedience [of an injunction] would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience." See also Union Tool Co. *v.* Wilson, 259 U. S. 107 (1922). How a judgment for damages resulting from civil contempt proceedings may also lead to indeterminate prison sentences because of inability or unwillingness of defendants to pay the judgment, see Senate Hearings on S. 1482 (1928), p. 795 *et seq.*

[185] See Root *v.* MacDonald, 260 Mass. 344 (1927).

[186] *Ibid.* 357.

[187] See People *ex rel.* Interborough Rapid Transit Co. *v.* Lavin, 131 Misc. 758 (N. Y., 1928).

[188] 28 U. S. C. § 387, 38 STAT. 738 (1914).

Some recent federal cases that outline the procedure in contempt are: Jennings *v.* United States, 264 Fed. 399 (C. C. A. 8th, 1920); Forrest *v.* United States, 277 Fed. 873 (C. C. A. 9th, 1922); Armstrong *v.* United States, 18 F. (2d) 371 (C. C. A. 7th, 1927).

[189] People *ex rel.* Interborough Rapid Transit Co. *v.* Lavin, 131 Misc. 758 (N. Y., 1928).

[190] Recent examples are: United States *v.* Bittner, 11 F. (2d) 93 (C. C. A. 4th, 1926); Dunham *v.* United States, 289 Fed. 376 (C. C. A. 5th, 1923). United States district attorneys sometimes appear as parties of record, Stephens *v.* Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917); Schwartz *v.* United States, 217 Fed. 866 (C. C. A. 4th, 1914); and sometimes not, Sona *v.* Aluminum Castings

> "Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protect-

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Co., 214 Fed. 936 (C. C. A. 6th, 1914). Reeder *v.* Morton-Gregson Co., 296 Fed. 785 (C. C. A. 8th, 1924) and many others.

For the part played by the federal district attorney in the Indianapolis car strike contempt proceedings, and for criticism thereof, see Senate Hearings on S. 1482 (1928) pp. 272, 344.

[191] The method of review of a conviction for criminal contempt is the same as in other criminal cases. United States *v.* Goldman, 277 U. S. 229 (1928); *Re* Merchants' Stock Co., Petitioner, 223 U. S. 639 (1912); Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 (1911); Root *v.* MacDonald, 260 Mass. 344 (1927). But see Matter of Hanbury, 160 App. Div. 662 (N. Y., 1914); Eastern C. S. Co. *v.* B. & M. P. I. U. Local No. 45, 200 App. Div. 714 (N. Y., 1922).

Prosecutions for criminal contempt are barred by the statute of limitations for crimes. Gompers *v.* United States, 233 U. S. 604 (1914). This is still the rule in federal courts, except as modified by § 25 of the Clayton Act (28 U. S. C. § 390). See United States *v.* Goldman, 277 U. S. 229 (1928), *rev'g* United States *v.* Whiffen, 23 F. (2d) 352 (S. D. Ohio, 1927). The provisions of the federal penal code with respect to removal, arrest and bail are applicable, Castner *v.* Pocahontas Collieries Co., 117 Fed. 184 (W. D. Va., 1902).

[192] Chapter II, *supra* p. 58, n. 46. *Cf.* People *ex rel.* Interborough Rapid Transit Co. *v.* Lavin, 131 Misc. 758 (N. Y., 1928) where a reversal of an injunction by the Court of Appeals on the ground that "'the injunction as issued, in its broad scope, was beyond the power of the court,'" was held to bar prosecution for contempt of the injunction based upon an act committed prior to the reversal.

In Hoeffken *v.* Belleville Trades & Labor Assembly, 229 Ill. App. 28 (1923), a contempt in violating a restraint against picketing was not purged by a subsequent modification of the injunction to allow peaceful picketing.

As to the executive's power to pardon for a criminal contempt, see *Ex parte* Grossman, 267 U. S. 87 (1925). The Chief Justice, in his opinion, points out that the President of the United States since 1840 exercised the power of pardon over criminal contempts twenty-seven times, *ibid.* at 118. But *cf.* State *v.* Magee Pub. Co., 29 N. Mex. 455 (1924) and cases collected in annotations in (1923) 23 A. L. R. 524; (1923) 26 A. L. R. 21; (1925) 38 A. L. R. 171. In State *ex rel.* Rodd *v.* Verage, 177 Wis. 295 (1922), the governor of Wisconsin was denied power to pardon for contempt of an injunction in a labor dispute.

The rule denying appeal from judgment for defendants in criminal cases, applies in criminal contempt cases, United States *v.* Bittner, 11 F. (2d) 93 (C. C. A. 4th, 1926).

[193] Chapter II, *supra* pp. 56-59.

ing one accused of ordinary crime from the danger of unjust conviction."[194]

Our Table of Federal Cases indicates thirty-six reported contempt proceedings arising out of labor controversies since 1901, in which approximately eighty-eight persons were convicted and fifteen acquitted. Of the convictions, fifty-eight were appealed, twenty-one reversed.

This concludes our effort to depict the mechanism of the injunction at work in American labor disputes. We have aimed more at a photographic portrayal than interpretation. The result offers a striking contrast to a judicial prophecy made a quarter century ago. "The courts", said a federal judge in 1902, "cannot hope to entirely foreclose discussion of these questions. But discussion is already nearly at an end by the courts, and by those having the slightest knowledge of jurisprudence."[195] Fortunately for law, the discussion has been most actively continued by some of our greatest judges. Economic contests having obstinate social implications are not permanently resolved by maxims of equity.[196]

Legal significances have been the concern of our survey. Questions of even more fundamental importance suggested by this material are beyond our competence for answer. Does conduct outlawed in industrial conflicts really cease when a court of equity "adjudges and decrees" that it cease, or is it transformed, with intensity and bitterness, by being forced under cover? What is the influence of injunctions upon the fate of strikes?[197] The damaging series of defeats of the United Mine Workers of America in the bituminous coal fields, since 1922, is frequently attributed in some degree to the many injunctions against it. But what is the degree—if any? What has been the reflex of the labor injunction upon the whole process of unionization? The organized labor movement in the United States reached its peak immediately following the World War.[198] But for twenty years injunctions had paralleled growth in union membership. These and like inquiries provoked by a history of the labor injunction, challenge the scholarship of social scientists and of students of trade unionism.

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[194] *Ex parte* Grossman, 267 U. S. 87, 117 (1925).

[195] McPherson, J., in Union Pac. R. Co. *v.* Ruef, 120 Fed. 102, 106 (D. Neb., 1902).

[196] See Mr. (now Mr. Chief Justice) Taft's statement in criticism of the Anderson injunction in the 1919 coal strike published in the *Philadelphia Ledger,* Nov. 20, 1919, reprinted in Senate Hearings on S. 1482 (1928) p. 38.

[197] Available evidence on this question is meager, and at best confused and conflicting. We have summarized some of the data in Appendix VIII.

Concerning the weakened prestige of the judiciary, due to the exercise of its equitable powers in labor controversies, there is considerable evidence.[199] The hostility and resentment of spokesmen for labor are not the indicia of confidence. The Director of Research and Investigation for the United States Commission on Industrial Relations [200] thus summarized opinion in 1915:

> "No testimony presented to the Commission has left a deeper impression than the evidence that there exists among the workers an almost universal conviction that they . . . are denied justice in the enactment, adjudication, and administration of law, that the very instruments of democracy are often used to oppress them and to place obstacles in the way of their movement towards economic, industrial, and political freedom and justice. . . .
>
> If it be true that these statements represent the opinions of the mass of American workers, there is reason for grave concern, for there are twenty five millions of them, of whom three millions are welded together into compact organizations." [201]

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[198] See WOLMAN, THE GROWTH OF AMERICAN TRADE UNIONS 1880-1923 (1924), and WOLMAN, *Labor,* in 2 RECENT ECONOMIC CHANGES (National Bureau of Economic Research) (1929), 479. The American Federation of Labor membership for key years is given as follows in the *N. Y. World Almanac:* 1900—548,321; 1910—1,562,112; 1920—4,078,740; 1925—2,878,297; 1927—3,312,526.

[199] See Chapter II, *supra* p. 52, n. 19.

[200] As to the nature of this commission, see Chapter II, p. 50, n. 9. The Director of Research and Investigation was Mr. Basil M. Manly and it is from pp. 38-39 of his report that we quote.

[201] In this connection, see Jane Addams (1908). 13 AMERICAN JOURNAL OF SOCIOLOGY, at 772, "From my own experience I should say perhaps that the one symptom among working-men which most definitely indicates a class feeling is a growing distrust of the integrity of the courts, the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is on the corporation side."

In *Trade Union Epigrams,* an official publication of the American Federation of Labor, at p. 7, appears this epigram: "In case of an injunction in labor disputes, contempt of court is respect for law." See Witte, Industrial Comm., Appendix B, pp. 56-57.

See People *v.* Makvirta, 224 App. Div. 419 (N. Y., 1928), for a criminal prosecution and conviction based on the distribution of circulars containing rabid attacks upon labor injunctions.

Further experience with the injunction has not softened but rather exacerbated this feeling. In a formal statement to a Committee of the United States Senate, Mr. William Green, the conservative President of the American Federation of Labor, recently used this language: "I say to you gentlemen that I know of no procedure in America that is fanning the flame of discontent to a greater degree than this misuse of the equity power." [202]

Confidence in the reason and rightness underlying decisions is the ultimate foundation of the Rule of Law. How American courts in labor litigation have fulfilled this requisite may be judged from the record of their doings. While the decisions express abstract legal principles, they derive from delicate and contemporaneous issues of policy. But economic sympathies and prepossessions may unwittingly foreclose the solution of these issues.[203] The conviction has been gathering that, in the language of Mr. Justice Brandeis, the injunction is not ordinarily sought "to prevent property from being injured nor to protect the owner in its use, but to endow property with

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The Chicago Federation of Musicians adopted as a by-law of the organization, the following: "Whenever the officers of this organization are enjoined or restrained by any court from giving orders to any member then employed at any place of employment mentioned in an injunction or restraining order, said injunction or restraining order shall itself act as an order to all members to cease playing at such places immediately and no further services shall be rendered by any member except upon a positive, separate official written order each day thereafter, under seal and signed by the President, until such time as said injunction or restraining order is vacated or dissolved." This by-law appears in the restraining order issued in Lubliner & Trinz Theatres, Inc. *v.* Chicago Federation of Musicians (N. D. Ill., Sept. 1928, Eq. No. 8563), unreported.

[202] Hearings on S. 1482 (*supra* note 31) p. 99.

[203] The psychologic difficulty of escaping the play of unconscious forces in matters vitally touching contemporary economic and social issues has been penetratingly put by Lord Justice Scrutton: ". . . the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate a judgment as you would wish. This is one of the great difficulties at present with Labour. Labour says: 'Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?' It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class." Scrutton, *The Work of the Commercial Courts* (1921) 1 CAMB. L. J. 6, 8.

active, militant power which would make it dominant over men."[204]

For a generation, Congress and state legislatures have sought to circumscribe these judicial interferences in labor disputes. To the story of this legislative effort we now turn.

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[204] Brandeis, J., in Truax *v.* Corrigan, 257 U. S. 312, 354, 368 (1921). And see (1921) 34 HARV. L. REV. at 406-07. G. W. Pepper, *Injunctions in Labor Disputes* (1924) 49 A. B. A. REP. 174, 179.

CHAPTER IV

LEGISLATION AFFECTING LABOR INJUNCTIONS

THE issuance of an injunction in a labor dispute is conditioned by the substantive law that determines legitimacy of challenged behavior, as well as by the principles and procedure of equity controlling the exercise of injunctive powers. Thus, corrective legislation must consider the policy of society towards industrial strife, and also the forms of legal remedy and the methods of their employment appropriate to proscribed conduct.[1]

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[1] Not all labor legislation, of course, aims at liberalization of judicial rulings. There are many state and city ordinances that go further than any judicial decisions in circumventing effective strike activities. Thus, ordinances and statutes forbidding picketing entirely and making such conduct criminal were sustained in Matter of Williams, 158 Cal. 550 (1919); Hardie-Tynes Mfg. Co. *v.* Cruise *et al.* 189 Ala. 66 (1914); *Ex parxte* Stout, 82 Tex. Cr. 183 (1917); Thomas *v.* City of Indianapolis, 195 Ind. 440 (1924), but invalidated in St. Louis *v.* Gloner, 210 Mo. 502 (1908). Some other city ordinances of interest are dealt with in the following cases: Watters *v.* City of Indianapolis, 191 Ind. 671 (1922), sustaining an ordinance which prohibited the display of placards and banners; Commonwealth *v.* McCafferty, 145 Mass. 384 (1888), *semble.* See L. of Tex. 1920, c. 5, § 5, making it unlawful to interfere with instrumentalities of commerce "by abusive language spoken or written. . . ." See, further, a compilation of statutes prepared by the United States Commissioner of Labor, TWENTY-SECOND ANNUAL REPORT OF COMMISSIONER OF LABOR (1907).

Some states have made the causing of a strike or lock-out prior to investigation by a commission a statutory offence. In Colorado, this is limited to industries "affected with a public interest". And see *Ex parte* Sweitzer, 13 Okla. Cr. 154 (1917) where a city ordinance prohibiting "loitering about the streets" was held inapplicable to peaceful picketing in the course of a strike; see Neb. Acts 1921, c. 235, NEB. COMP. STAT. (1922) §§ 9752-53; L. of Colo. 1915, c. 180, § 30; see People *v.* United Mine Workers, 70 Colo. 269 (1921); People *v.* Fontuccio, 73 Colo. 288 (1923). Section 17 of the Court of Industrial Relations Act, L. of Kan. (Special Session, 1920), c. 29, though reserving to the individual employee the right to quit work at any time, makes it unlawful to conspire "to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of" coal mining; and see § 19 making it a felony to induce a violation of § 17. Although this general scheme of legislation was held invalid by the Supreme Court (Wolff Co. *v.* Industrial Court, 262 U. S. 322 (1923)), §§ 17 and 19 were held to be severable (The State *v.* Howatt *et al.* 116 Kan. 412 (1924)), and thus treated

Reform of abuses of the injunction therefore presents a variety of problems for solution. Legislation might immunize activities of organized labor from all tort liability—pecuniary responsibility as well as restraint of conduct—or merely define the conduct to be deemed a wrong. Again, it might withdraw from the scope of injunctive relief activities normally prevalent in labor controversies, or merely fashion a procedure especially suitable to injunctions in such cases. In fact, legislation has entered all these fields.

LEGISLATION AFFECTING SUBSTANTIVE LAW

Outright exception of trade union activity from liability for tortious acts, such as the English Trade Disputes Act of 1906 [2]

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as an independent statute were held constitutional by the Supreme Court (Dorchy *v.* Kansas, 272 U. S. 306 (1926)). But the Court was careful to limit its decision to the question (at 309) "whether the prohibition of § 19 is unconstitutional as here applied"; and after considering that in this case the strike was called in order to force the payment of a stale claim due a union member, decided, in effect, that a statute forbidding a strike for such a purpose was not invalid. The Court said: "Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike." For a discussion of Dorchy *v.* Kansas, see Mason, *The Right to Strike* (1928) 77 U. OF PA. L. REV. 52. The American Federation of Labor, in its official publication, draws this inference from the case: "It now seems clear that our various state legislatures may declare strikes for certain objects to be unlawful and any one urging such a strike may be deemed guilty of a felony and be subject to fine and imprisonment. This decision in the Dorchy case will undoubtedly be the forerunner of several attempts to curtail the right of labor unions to strike." (1926) 33 AMERICAN FEDERATIONIST 1502.

See Moorfield Storey, *The Right to Strike* (1922) 32 YALE L. J. 99; Richberg, *Developing Ethics and Resistant Law* (1922) 32 YALE L. J. 109; (1922) 32 YALE L. J. 157.

Federal legislation to curb the right to strike has been proposed several times in recent years. The Esch-Cummins Bill, as originally drafted, prohibited strikes in interstate commerce, imposing a severe penalty for each such offense. The clause was stricken out in the House. In 1921, President Harding made such a recommendation. The Watson-Parker Railway Labor Act of 1926 (44 STAT., pt. 2, 577) permits the right to strike only after prescribed methods of conciliation and arbitration have been tried and proved futile. See Brotherhood of Ry. & S. S. Clerks, *etc. v.* Texas & N. O. R. Co., 24 F. (2d) 426 (S. D. Tex., 1928), 25 F. (2d) 873, 25 F. (2d) 876; aff'd., 33 F. (2d) 13 (C. C. A. 9th, 1929).

[2] 6 Edw. VII, c. 47 (1906): "4.—(1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." "The act was passed in direct opposition to

introduced, has not been made by any American legislature. In an advisory opinion to the Massachusetts Senate, the Justices of the Massachusetts Supreme Judicial Court in 1912 considered such a proposal and dealt it an effective quietus.[3] In the opinion of the Justices, such legislation would violate the "underlying principles and fundamental provisions" both of the Massachusetts and the United States Constitutions—guarantees against deprivation of life, liberty and property without due process of law, guarantees of the equal protection of the laws and of absolute equality before the law.

Measures granting a more restricted freedom to the promotion of labor's claims have prevailed. In essence, they constitute attempts to curb the two judicial conceptions which have played the most prolific rôles in the evolution of the labor injunction—the doctrines of "conspiracy" and of "restraint of trade".[4]

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the dogmatic principles prevailing at the time as to liability for torts and the responsibility of principals for tortious acts of their agents. The dialectical side of the problem had been fully considered and settled by the judgement of the court of appeals of the *Taff-Vale Case*. Parliament, however, passed the Trade Disputes Act as a measure necessary to allow organized labour to exert its action as a counter-poise to the power of capital wielded by the employers." 2 VINOGRADOFF, COLLECTED PAPERS (1928) 323. See Geldart, *The Present Law of Trade Disputes and Trade Unions* (1914); POLITICAL QUARTERLY No. 2 16-71; WEBB, HISTORY OF TRADE UNIONISM (1920) 604-08; DICEY, LAW AND OPINION IN ENGLAND (2d ed. 1919) p. XLIV *et seq.*; TILLYARD, INDUSTRIAL LAW (1928). The general strike of 1926 also had its reflex in English legislation, resulting in the Trade Disputes and Trade Unions Act, 17 & 18 Geo. V, c. 22, 1927. See the debates upon this measure in the House of Lords, 68 HANS. DEB. (House of Lords), 2 *et seq.* (1927), particularly the speech of the Marquis of Reading at 67. On July 2, 1929, Sir W. A. Jowitt, Attorney General, on behalf of the MacDonald Government gave notice that at an early date he would ask leave to present a "Bill to amend the Trade Disputes and Trade Unions Act, 1927." 229 HANS. DEB. (House of Commons) 45 (1929). As to the Act, see Note (1929) 42 HARV. L. REV. 550.

[3] Opinion of the Justices, 211 Mass. 618 (1912). For a defense of advisory opinions generally, see Hudson, *Advisory Opinions of National and International Courts* (1924) 37 HARV. L. REV. 970, and for a criticism, *semble,* Note by Frankfurter (1924) 37 HARV. L. REV. 1002, 1006: ". . . advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues."

[4] See *supra* Chapter I, p. 2 *et seq.*

In the decade from 1880 to 1890, a number of states[5] passed laws permitting "co-operation of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation or of maintaining such rate."[6] But courts stuck close in the bark of this language. A strike in furtherance of trade union existence, though not immediately in pursuit of the purposes expressed by the statute, was outside its pale;[7] since immunity only against criminal proceedings was explicitly given, civil remedies remained unaffected whether through an action for damages or a suit for an injunction.[8] In Congress numerous bills were proposed for more effective sterilization of the conspiracy doctrine.[9] They were never enacted. The Wilson bill of 1911 provided that no agreement concerning "any act or thing to be done . . . with reference to . . . a labor dispute . . . should constitute a conspiracy unless the act agreed upon would be unlawful if done by a single individual."[10] This would have drawn the sting of legal significance from the fact of combination. The Clayton Act, in which the Wilson proposals finally culminated, rejected such a provision and left undisturbed existing judicial views of conspiracy. As late as 1926,[11] another effort failed to secure enactment for the policy embodied in the proposal of 1911.

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[5] Ill. L., 1873, 76; Me. Rev. Stat. (1883) c. 126, § 18; Md. L., 1884, c. 266; Minn. Pen. Code (1886) § 138; N. J. L. 1883, c. 28; N. Y. L., 1870, c. 19; N. Y. Pen. Code (1881) § 170; N. Y. L., 1882, c. 384; Pa. L., 1869, Act No. 1242; Pa. L., 1872, Act No. 1105; Pa. L., 1876, Act No. 33. Early legislation that a strike is not a conspiracy: Md. Code of Pub. Gen. Laws (1888) art. 27, § 31; N. J. Rev. Stat. (1877) 1296; Pa. Brightly's Dig. (1885), 1172. A compilation of the statutes up to 1892 was prepared under the direction of C. D. Wright, Commissioner of Labor: A Compilation of the Labor Laws of the United States and Territories and the District of Columbia, Report No. 1960. See also Tenth Special Report of Commissioner of Labor (1904) and Twenty-Second Annual Report of Commissioner of Labor (1907), the latter being cumulative.

[6] N. Y. Pen. Law (1926) § 582.

[7] Auburn Draying Co. *v.* Wardell, 89 Misc. 501 (N. Y., 1915), *aff'd* 227 N. Y. 1 (1919); Davis Machine Co. *v.* Robinson, 41 Misc. 329 (N. Y., 1903); Grassi Contracting Co. *v.* Bennett, 174 App. Div. 244 (N. Y., 1916); People *v.* Epstean, 102 Misc. 476 (N. Y., 1918), appeal dismissed, 190 App. Div. 899 (1919). It will be recalled that a similar fate was visited upon the Massachusetts statute authorizing peaceful persuasion. See *supra* Chapter I, p. 31. In the 1929 session of the Massachusetts legislature, a bill (House No. 887) was introduced to legalize strikes "or other concerted action" to secure, *inter alia,* the closed-shop and collective bargaining. The bill secured considerable support (see *Boston Herald,* Feb. 13, 1929, p. 20, col. 5) but failed of passage. *Id.* May 10, 1929, p. 14, col. 6.

Some states have provided that workers might combine to carry out "their legitimate purposes as freely as they could do if acting singly." Ore. L. (Olson, 1920) § 6817; Minn. Stat. (Mason, 1927) § 4255. But obviously the crucial question as to what are "legitimate purposes" remains.

[8] See, *e.g.,* Rogers *v.* Evarts, 17 N. Y. Supp. 264 (1891); Frank & Dugan *v.* Herold, 63 N. J. Eq. 443 (1902); Jonas Glass Co. *v.* Glass Bottle Blowers' Association, 77 N. J. Eq. 219 (1908). But see Reynolds *v.* Everett, 67 Hun. 294 (N. Y., 1893), *aff'd* 144 N. Y. 189 (1894).

[9] S. 4233, H. R. 8917, 56th Cong., 1st Sess.; H. R. 89, H. R. 1234, H. R. 4063, 58th Cong., 1st Sess.; H. R. 6782, H. R. 8136, 58th Cong., 2d Sess.; H. R.

On the whole, legislation has done little to restrict the courts in applying common law notions of conspiracy to labor disputes. We owe to the judicial process such liberalization as there has been of the conspiracy concept.[12] Legislation has merely registered judicial modifications; it has not been creative.

Statutory innovation has been bolder in creating exceptions to the anti-trust laws. Many states have saved organizations of labor from the operation of statutes subjecting combinations in "restraint of trade" to liability both criminal and civil. The Nebraska Anti-Trust Act of 1897[13] was perhaps the earliest to exempt "any assemblies or associations of laboring men" for the purpose of raising wages. This was deemed unconstitutional favoritism when the law first came before a federal court sitting in Nebraska:

> "Dozens of statutes have been held invalid by appellate courts which sought to make it invalid for one class of men to do one thing and lawful for other men, practically under the same circumstances, to do another, but like, thing."[14]

A year later the Nebraska Supreme Court reached a contrary conclusion, holding that the legislature had made a reasonable classification:

4445, 59th Cong., 1st Sess.; H. R. 17137, 60th Cong., 1st Sess.; H. R. 3058, 61st Cong., 1st Sess. Other early bills are referred to in *supra* Chapter I, p. 4, n. 18.

[10] H. R. 11032, 62nd Cong., 1st Sess. See Hearings before the House Committee on the Judiciary (62nd Cong., 2nd Sess.), Injunctions (1912).

[11] S. 972, H. R. 3920, 69th Cong., 1st Sess. This bill is reprinted in (1924) 6 LAW AND LABOR 85.

[12] See Brandeis, J., in Truax *v.* Corrigan, 257 U. S. 312, 361-62 (1921).

[13] L. of Neb., (1897), c. 79.

[14] Niagara Fire Ins. Co. *v.* Cornell, 110 Fed. 816, 825 (D. Neb., 1901).

> "The distinction between goods and merchandise produced by skill and labor and the skill and labor which produced them is manifest and reasonable."[15]

So wrote Roscoe Pound, then a member of the Nebraska court. In 1914 the Supreme Court of the United States sustained this viewpoint in passing upon a similar Missouri statute. The Court found nothing in the federal Constitution against a state's freedom to decide for itself "whether a combination of wage earners . . . called for repression by law."[16]

The attempt to withdraw labor unions from the scope of federal anti-trust legislation is a long and lively bit of Congressional history. Following the early decisions by the federal courts that the Sherman Law covered combinations of labor as well as of capital,[17] the effort began in Congress to express a contrary intent. The Littlefield anti-trust bill of 1900[18] was amended in the House by inserting the following clause recommended by the minority[19] of the House Judiciary Committee:

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[15] Cleland *v.* Anderson, 66 Neb. 252, 260 (1902).

[16] International Harvester Co. *v.* Missouri, 234 U. S. 199 (1914). But *cf.* Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540 (1902) and comment thereon by Mr. Taft in 1914: "Attempts are being made in Congress to exclude from the operation of the anti trust act trades-unions and farmers. I hope this will never be done. . . . A law with a similar exemption was passed by the legislature of Illinois. It was held by the United States Supreme Court to be invalid because it denied to all the people of Illinois the equal protection of the laws. While that case was under the Fourteenth Amendment, which prevents a State from denying equal protection of the laws to any persons within its jurisdiction, it would be a question whether the Supreme Court might not find in the first eight amendments of the Constitution a prohibition upon Congressional legislation having similar unjust operation." THE ANTI-TRUST ACT AND THE SUPREME COURT (1914) 98-99.

[17] See *supra* Chapter I, p. 8. The Congressional debates on the Sherman Act are to be found in volume 21 of the Record, especially for March 27, 1890. On March 25, 1890, Senator Sherman proposed a proviso excluding labor and farm organizations from the terms of the Act. This proviso, agreed to in Committee of the Whole, was omitted when the bill was again reported out of Committee to the floor of the Senate on April 2, 1890. Whether the reason for the deletion of the proviso was opposition to it or a belief that the Act itself so clearly excluded labor that the proviso was unnecessary—the Record does not settle. For weighty contemporaneous opinion that the amendment was unnecessary, see the speeches of Senator Hoar, 21 CONG. REC. 2729 (1890), of Senator Stewart, *ibid.* 2606, and of Senator Teller, *ibid.* 2562. The speech of Senator Hoar is all the more significant as it was he who, as a member of the Judiciary Committee, recast the bill. See 2 HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS (1903) 264 *et seq. Cf.* MASON, ORGANIZED LABOR AND THE LAW (1925) c. VII. And see Edmunds, *Interstate Trust and Commerce Act of 1890,* (1911) 194 N. AM. REV. 801; WASHBURN, THE HISTORY OF A STATUTE (The Sherman Anti-Trust Act) (1927).

> "Nothing in this act shall be so construed as to apply to trade unions or other labor organizations organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is to be performed."

The bill so amended passed the House[20] but was buried in the Senate Judiciary Committee.[21] This history repeated itself in the Fifty-seventh Congress,[22] in the Sixtieth Congress,[23] in the Sixty-second Congress.[24] Failure by direct attack provoked a more successful flank movement. Friends of the reform saw their opportunity to restrict appropriations for enforcement of the anti-trust laws, by writing into the sundry appropriations bills a proviso against using any funds for prosecutions of labor organizations. Such a provision passed the House in 1910, but did not come out of the Senate; [25] it passed both Houses in 1913 but led to President Taft's veto; [26] it again passed both Houses in 1913 and, though the item was strongly disapproved, this time the bill was signed by President Wilson.[27] Every similar appropriation since then has carried the restriction that no money be

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[18] Introduced by Mr. Littlefield April 7, 1900, and referred to the Committee on the Judiciary. The bill was reported May 16, 1900, with amendments (H. Rep. 1506 to accompany H. R. 10539, 56th Cong., 1st Sess.). An even earlier bill was introduced in the 52nd Congress (1st Sess.), H. R. 6640.

[19] H. Rep. 1506, pt. 2, p. 4, 56th Cong., 1st Sess. to accompany H. R. 10539. This bill, the amendments and reports are reprinted in a volume prepared under the direction of the Attorney General, 1 BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS (1903). The minority report, above referred to, said concerning this proposed amendment that it ". . . explains itself, but we observe that it is rather a curious fact, so far as we have been able to learn, that the only criminal convictions ever obtained under the Sherman antitrust law have been in cases of laboring men on a strike for higher wages, and no trust magnate, officer, or agent has ever been put behind the bars. . . ."

[20] The bill in this form is reprinted in full in 34 CONG. REC. 2728 (1901).

[21] 33 CONG. REC. 6669-70 (1900); 34 CONG. REC. 3438-39 (1901).

[22] H. R. 11988; H. R. 14947; S. 649 (1st Sess.).

[23] S. 6440; S. 6900; S. 6331; S. 6913 (1st Sess.). Hearings were had that session on S. 6331 and S. 6440. See Hearings before the Subcommittee of the Senate Committee on the Judiciary on Amendment of Sherman Antitrust Law (1908).

[24] H. R. 40; H. R. 5606 (1st Sess.) referred to Committee on Judiciary. See volumes prepared for the use of the Committee on the Judiciary, House of Representatives, 3 BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS 2466 where the above-mentioned bills are reprinted.

These repeated failures were used by counsel as an argument before the Supreme Court in Loewe *v.* Lawlor, 208 U. S. 274, 280 (1908), to prove Congressional intent in the Sherman Law: "Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more significant, as it followed the recognition by the courts [inferior federal courts] that the Sherman Anti-Trust law applied to labor organizations."

> "spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours, or bettering the conditions of labor, or for any act done in furtherance thereof not in itself unlawful. . . ." [28]

Bills containing such a provision became law through the signatures of President Harding and President Coolidge.

But greater promises were made to labor in the presidential campaign of 1912. By its platform, the Democratic Party was committed to the withdrawal of labor and farm organizations from condemnation by the Sherman Law.[29] The election of Woodrow Wilson made some action inevitable. Relief for labor was an aim too deeply associated with Wilson's gospel of "the new freedom" [30] not to survive campaign speeches. But a campaign promise is one thing; legislative performance quite another. To trace the course of legislation by which performance was attempted in this instance, is to gain insight into the physiology of law-making when powerful social forces contend for mastery.

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[25] See the Senate debate thereon, 45 CONG. REC. 8849-52 (1910) and American Federation of Labor letters insisting upon this proviso, *ibid*. A short summary of the Congressional history of this legislation is given in 51 CONG. REC. 9540-41 (1914).

[26] The veto message appears in 49 CONG. REC. 4838 (1913). He said in part: "This provision is class legislation of the most vicious sort."

[27] 38 STAT. 53 (1913). The Senate debates are reported in 50 CONG. REC. 1096, 1102-14, 1189-97, 1269-86 (1913). President Wilson's statement issued in connection with the signing of this bill said that if the proviso could have been separated from the bill, he "would have vetoed that item, because it places upon the expenditure a limitation which is, in my opinion, unjustifiable in character and principle." He added: "I can assure the country that this item will neither limit nor in any way embarrass the actions of the Department of Justice. Other appropriations supply the department with abundant funds to enforce the law." See 51 CONG. REC. 14604 (1914).

[28] See *e.g.*, 44 STAT. 1194 (1927). See LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE (1914) 260.

[29] PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1912) 372; 51 CONG. REC. 9165 (1914).

[30] WOODROW WILSON, THE NEW FREEDOM (1913), *passim*.

As originally introduced in the House, the bill for the correction of abuses in issuing labor injunctions carried no exemption of labor organizations from the scope of the anti-trust laws. Upon the plea of Samuel Gompers,[31] speaking for organized labor, a provision to this end was reported by the House committee and passed by the House. In the course of the Senate debate upon the bill, an amendment was proposed and adopted [32] in the form of the famous sentence, "The labor of a human being is not a commodity or article of commerce." [33] By President Wilson's signature, these provisions, as Section 6 of the Clayton Act, became law on October 14, 1914. The exact text of this section is important:

> "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." [34]

This measure [35] brought labor, so it was thought, into the promised land. "Those words, the labor of a human being is not a commodity or article of commerce", Samuel Gompers informed the trade union movement, "are sledge hammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the industrial magna charta upon which the working people will rear their construction of industrial freedom."[36] And descending to particulars, Mr. Gompers added, "This declaration removes all possibility of interpreting trust legislation to apply to organizations of the workers, and their legitimate associated activities."[37] Whether this expectation coincided with Congressional intent is meat for endless dialectic. The debates in Congress looked both ways. When the bill was first reported out of the House Judiciary Committee, one of its members, referring specifically to the clause—"Nor shall such organizations . . . be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws,"—said that this "would clearly exempt labor organizations . . . from the provisions of the anti-trust laws"; that it "would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman anti-trust law."[38] Another member of the same committee told the House "We are taking them [labor organizations] out from the ban of the present law to the extent that in future they cannot be dissolved as unlawful combinations. Their existence is made lawful and they are given a legal status." [39] These expressions may serve as a cross section of Congressional opinion. Did the section merely legalize what was already legal, *i.e.*, the mere existence of labor unions, or did it completely immunize labor organizations from prosecution or suit under the Sherman Law? [40] The majority report of the House Committee adopted the innocuous view of the measure.[41] A minority of the same committee suggested that the act would merely prevent suits for the dissolution of labor organizations, but would continue to permit the issue of injunctions under the Sherman Law to restrain them from carrying out their purpose.[42] No less equivocal is the evidence furnished by the debate in the Senate. Senator Pittman was confident that as a result of the new measure the anti-trust laws have "nothing to do with organized labor . . . that any unlawful acts committed in the pursuit of the objects of their organizations shall be tried and determined by other existing laws." [43] To which Senator Cummins replied that "in my view he [Senator Pittman] has stated just what Section 7 [Section 6 of this bill as passed] does not do." [44] A rather large group of Congressmen attacked the legislation as futile if it aimed only at legalization of what was already legal, and vicious if it accomplished the immunization of labor from the anti-trust laws.[45]

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[31] 51 CONG. REC. 9165-66 (1914).

[32] 51 CONG. REC. 14610 (1914).

[33] 51 CONG. REC. 14590 (1914). Senator Cummins of Iowa: "It is high time that we recognize the difference between the power of a man to produce something and the thing which he produces. . . . The thing in which he is dealing is not a commodity, and if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital . . . we have lost the main distinction that warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work . . . shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly." *Ibid.* 14585.

[34] 38 STAT. 731 (1914), 15 U. S. C., § 17.

[35] The identical clause or a paraphrase thereof appears in state statutes, both antedating and following the Clayton Act. Such statutes are: CAL. STAT. (1909) c. 362; Cal. Gen. L. (Henning, 1920) Act 5264, § 13; MINN. STAT. (Mason, 1927) § 4258; Ore. L. (Olson, 1920) § 6817; WASH. COMP. STAT. (Remington, 1922) § 7613; WIS. STAT. (1927) § 133.05.

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[36] (1914) 21 AMERICAN FEDERATIONIST 971. In February of 1917, a federal judge (Killits, D. J.), said: "We may as well call it an 'Employer's Bill of Rights' . . ." Stephens *v.* Ohio State Telephone Co., 240 Fed. 759, 770 (N. D. Ohio, 1917).

President Wilson's own characterization of the significance of this legislation may be recalled: "The working men of America have been given a veritable emancipation, by the legal recognition of a man's labour as part of his life, and not a mere marketable commodity; by exempting labour organizations from processes of courts which treated their members like fractional parts of mobs and not like accessible and responsible individuals. . . ." Woodrow Wilson's address accepting his renomination Sept. 2, 1916, 1 MESSAGES AND PAPERS OF WOODROW WILSON (1924) 302, 307.

[37] See (1914) 21 AMERICAN FEDERATIONIST, an editorial entitled, *Anti-Trust Law Enmeshes Labor*. This is reprinted in 51 CONG. REC. 16340 (1914).

[38] Representative Henry of Texas, 51 CONG. REC. 9540 (1914). He also said, in part: "We are now about to correct that error, and make it plain and specific, by clear-cut and direct language, that the antitrust laws against conspiracies in trade shall not be applied to labor organizations and farmers' unions." *Ibid.* 9541.

This brief history illustrates how fictitious can become the search by courts for "the intent of the legislature" in construing ambiguous enactments. With a legislative history like that which surrounds the Clayton Act, talk about the legislative intent as a means of construing legislation is simply repeating an empty formula. The Supreme Court had to find meaning where Congress had done its best to conceal meaning.[46] In June, 1917, in denying, for the majority of the Court, *equitable* relief in a labor case [47] on the two grounds that the Sherman Law only authorized the government and not private suitors to obtain injunctions, and that the Clayton Act, which did grant such authority,[48] came too late to apply to this case, Mr. Justice Holmes expressed the view that even if the Clayton Act were applicable it "establishes a policy inconsistent with the granting of one [an injunction] here." [49] But, Mr. Justice Holmes added prophetically, "I do not go into the reasoning that satisfies me, because upon this point I am in the minority." [50] Before very long another case compelled decision on the issue, and the majority of the Court concluded that "there is nothing in the section [6] to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade." [51] The long-drawn-out battle on the national stage, to withdraw labor tactics from the risks of judicial notions concerning "restraint of trade", was fought and lost.

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[39] Representative Floyd of Arkansas, 51 CONG. REC. 9166 (1914).

[40] Mr. MacDonald of Michigan lucidly exposed the verbal deception: "If you mean to exempt these associations from this bill, exempt them and say in so many words that this legislation is not intended to apply to these organizations. Do not attempt to leave any loophole for the claim that while the existence of these organizations is not prohibited yet the courts may still hold the exercise of their vital functions unlawful." 51 CONG. REC. 9249 (1914).

[41] H. Rep. 627, 63rd Cong., 2nd Sess. to accompany H. R. 15657.

[42] H. Rep. 627, pt. 3, 63rd Cong. 2nd Sess. to accompany H. R. 15657.

[43] 51 CONG. REC. 14588 (1914). His further remarks are of interest: "There are ample laws to punish men who commit crime. . . . There is no fear that there will be lack of punishment. It is simply a question as to whether or not labor . . . should be subjected to this particular act. Labor has always contended that it should not be subjected to this particular act, because it is an act that depends largely upon the equity discretion of a single judge or a court. . . ."

[44] 51 CONG. REC. 14588 (1914).

[45] 51 CONG. REC. 9249 (MacDonald); 9082, 16283 (Volstead); 9544, 14021 (Thomas); 13918 (Borah); 14013 (Jones), (1914).

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[46] See *Labor is not a Commodity* (1916) 9 NEW REPUBLIC 112; *ibid.* 243.

[47] Paine Lumber Co. *v.* Neal, 244 U. S. 459 (1917).

[48] 38 STAT. 737, § 16 (1914), 15 U. S. C., § 26 (1926). Prior to the enactment of this section, the rule was established that private parties were not entitled to sue under the anti-trust laws to prevent or restrain a violation of such laws.

[49] Paine Lumber Co. *v.* Neal, 244 U. S. at 471 (1917).

[50] *Ibid.* 484. Pitney, J., wrote the dissent, concurred in by McKenna and Van Devanter, JJ. He said: "Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them."

[51] Duplex Co. *v.* Deering, 254 U. S. 443, 469 (1921). Pitney, J., now writing the majority opinion, said: "As to § 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade."

The attempted modification of one other judicial doctrine of substantive law remains to be noted. The courts had ruled that it is illegal to persuade employees to join a union when such workers are under contract to their employers not to become union members while in their employ. This doctrine plays a leading rôle in the industrial conflict. Recognizing that such agreements in large part represent the superior economic position of the employer by virtue of which the theoretical freedom of an employee to refuse assent was illusory, and that such agreements therefore emptied of meaning the "right of collective bargaining", legislatures, particularly in the industrialized states, passed laws prohibiting the discharge of an employee merely because of his membership in a labor union, and forbidding employers to require workers to agree not to become or remain union members. Such statutes were passed in quick succession in many states, including Connecticut, Illinois, Kansas, Massachusetts, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, and Wisconsin.[52] Such legislation, sponsored by Richard Olney, Cleveland's Attorney General, was also passed by Congress as a result of the abuses of discrimination against union men reported to Congress by the weighty commission that inquired into the causes of the Pullman strike.[53]

But state courts and later the Supreme Court of the United States denied the power to pass such legislation to states [54] and nation.[55] It ran counter to judicial conceptions of "Liberty of Contract" which the Supreme Court discovered within "the vague contours" [56] of the due process clause. Though actually intervening in the push and tussle of the industrial conflict, the Court seems not to move outside the logical framework of an abstract syllogism: freedom of contract and the right of private property are protected by the Constitution; "wherever the right of private property exists, there must and will be inequalities of fortune";[57] it is "impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." [58] Such reasoning presupposes a perfectly balanced symmetry of rights: the employer and employee are on an equality, and legislation which disturbs that

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[52] N. Y. Pen. Code (1887) § 171a; Mo. L., 1893, 187; Ohio Rev. Stat. (Bates, 1903) §§ 4364-4366; Pa. L., 1897, Act No. 98; Wis. L., 1899, c. 332; Ill. Rev. Stat. (Hurd, 1899) c. 48, par. 32; KAN. GEN. STAT. (1901) §§ 2425, 2426; Mass. Gen. L., (1921) c. 149, § 20; Ore. L. (Olson, 1920), § 2181; Okla. Acts 1907-1908, 513; Okla. Comp. L., (1909) § 4041; CONN. GEN. STAT. (1918), § 6359. See Bulletin of the Bureau of Labor Statistics, No. 148, Vols. I and II.

[53] JAMES, RICHARD OLNEY (1923) c. 5; 2 MCELROY, GROVER CLEVELAND (1923) c. 5. See United States Strike Commission, REPORT ON THE CHICAGO STRIKE OF JUNE-JULY 1894 (1895).

[54] People *v.* Marcus, 185 N. Y. 257 (1906); State *v.* Julow, 129 Mo. 163 (1895); Gillespie *v.* The People, 188 Ill. 176 (1900); State *v.* Bateman, 7 Ohio N. P. 487 (1900); State *ex rel.* Zillmer *v.* Kreutzberg, 114 Wis. 530 (1902); Brick Co. *v.* Perry, 69 Kan. 297 (1904); Goldfield Consol. Mines *v.* Goldfield M. U. No. 220, 159 Fed. 500 (D. Nev., 1908); People *v.* Western Union Co., 70 Colo. 90 (1921); Montgomery *v.* Pacific Electric Ry. Co., 293 Fed. 689 (C. C. A. 9th, 1923). These rulings were, in effect, sustained by the Supreme Court in

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Coppage *v.* Kansas, 236 U. S. 1 (1915), considered in (1915) 15 Col. L. Rev. 272; (1915) 28 Harv. L. Rev. 496, 518; (1915) 13 Mich. L. Rev. 497; (1915) 24 Yale L. J. 677. And see Powell, *Collective Bargaining Before the Supreme Court* (1918) 33 Pol. Sci. Q. 396.

[55] Adair *v.* United States, 208 U. S. 161 (1908) invalidating § 10 of the Erdman Act. The specific section in question made it criminal for an interstate carrier to discharge an employee because of his membership in a labor union. This provision was invalidated not only on the ground that it was an invasion of the guarantees of liberty and property of the Fifth Amendment, but also on the ground that such legislation was not within the power of Congress to enact. Reminding that the power to regulate commerce authorizes only such legislation as has "some real or substantial relation to or connection with the commerce regulated", the Court asked "what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" 208 U. S. at 178. For a criticism of the case and an answer to the Court's question, see Olney, *Discrimination Against Union Labor—Legal?* (1908) 42 Am. L. Rev. 161 and Pound, *Liberty of Contract* (1909) 18 Yale L. J. 454.

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair* v. *United States*, 208 U. S. 161, and *Lochner* v. *New York*, 198 U. S. 45 should be overruled." Mr. Justice Holmes dissenting in Coppage *v.* Kansas, 236 U. S. 1, 26-27 (1915).

[56] Holmes, J., dissenting in Adkins *v.* Children's Hospital, 261 U. S. 525, 568 (1923).

[57] Coppage *v.* Kansas, 236 U. S. 1, 17 (1915).

[58] *Ibid.* at 17.

equality is "an arbitrary interference with the liberty of contract which no government can legally justify in a free land." [59] In vain did Mr. Justice Holmes oppose such jejune abstractions by insisting on the realism behind the aim of law to further an actual "equality of position between the parties in which liberty of contract begins." [60] Against such efforts the majority invoked the Constitution.

Employers heavily capitalized the failure of this legislation, particularly after the *Hitchman Case*.[61] Building upon the disability of legislatures to prohibit "yellow dog contracts", employers used these agreements to create barriers against unionization.[62] In the *Hitchman Case,* it will be recalled, the Supreme Court gave equitable protection to these agreements by enjoining employees who had subscribed to them, even when employed merely from day to day and not for a definite term. This decision brought realization to employers that "yellow dog contracts" had more than psychologic potency.[63] The use of these arrangements and their variants in the form of company unions, has spread widely and rapidly.[64] The system, which is referred to as the "American plan", covers nearly all the unorganized coal fields in Ohio, Pennsylvania, West Virginia and elsewhere.[65] Recent hearings before the Senate Judiciary Committee furnish ample testimony that it is today one of the most active forces in large-scale industry.[66]

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[59] Harlan, J., in Adair *v.* United States, 208 U. S. 161, 175 (1908). These abstract conceptions concerning "Liberty of Contract" were long ago rejected by conservative English statesmen and English legislation as inapplicable to modern conditions. See, for instance, the statement of Lord Randolph Churchill to Mr. Moore Bayley in 1884: "In answer to your question as to my views on the rights of contract I beg to inform you that where it can be clearly shown that genuine freedom of contract exists I am quite averse to State interference, so long as the contract in question may be either moral or legal. I will never, however, be a party to wrong and injustice, however much the banner of freedom of contract may be waved for the purpose of scaring those who may wish to bring relief. The good of the State, in my opinion, stands far above freedom of contract; and when these two forces clash, the latter will have to submit. If you will study the course of legislation during the last fifty years, you will find that the Tory party have interfered with and restricted quite as largely freedom of contract as the Liberals have done." 2 CHURCHILL, LORD RANDOLPH CHURCHILL (1906) 505.

[60] Holmes, J., in Coppage *v. Kansas,* 236 U. S. at 27.

[61] 245 U. S. 229 (1917); *supra* p. 37. See Powell, *Collective Bargaining Before the Supreme Court* (1918) 33 POL. SCI. Q. 396.

[62] See *The "Yellow Dog" Device as a Bar to the Union Organizer,* note in (1928) 41 HARV. L. REV. 770; Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728.

[63] See Cochrane, *Why Organized Labor is Fighting "Yellow Dog" Contracts* (1925) 15 AM. LAB. LEG. REV. 227-28, where it is said: "There is, however, undoubtedly, a psychological effect upon some employees, particularly the ignorant or illiterate worker, when he affixes his signature and his mark to a written agreement. He doesn't know what may not happen if he even incurs the displeasure of his employer. To him it might involve not only his being fired, but he might also be punished—perhaps fined and imprisoned; and when there is included

Such a challenge to organized labor was bound to arouse appeal for legislative help. The first and thus far the only statutes do not directly outlaw "yellow dog contracts", but deny equitable relief "in all cases involving the violation of a contract of employment . . . where no irreparable damage is about to be committed upon the property or property rights." [67] In 1925, a bill sponsored by the Ohio State Federation of Labor which

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in the individual contract a clause whereby the employee promises to have no dealings or talks with any one in regard to union matters, the employer, playing upon the fears and apprehensions of the ignorant man, finds that such contracts assist, perhaps to a very marked degree, in not only keeping the union out, but keeping the union at a distance. . . . There is, also, an effect upon intelligent trade-union officials, for when they are notified by a firm's attorney that an effort is being made to organize employees who have signed individual contracts, the trade-union official cannot escape having in mind the possibility of involved and costly court costs."

[64] The President of the American Federation of Labor (Mr. Green) testified: "Ever since the Hitchman injunction case . . . employers of labor have been making what they term individual agreements with their employees. Those agreements usually provide that the employee will not join a labor union while in the employ of the corporation . . . along with the individual contract there has developed the company union. . . . Usually these company unions are organized and formed by some officer of the corporation. These company unions in the General Electric, or the Pennsylvania Railroad, upon transportation concerns, the Standard Oil, the steel companies, and others have been inspired and developed by the companies themselves." Hearings on S. 1482, pp. 2, 87. See testimony as to specific cases, *ibid.* pp. 89-93, 662-69; (1920) 2 LAW AND LABOR 184, 188, 206. *Cf.* Stern, *A New Legal Problem in the Relations of Capital and Labor* (1926) 74 U. OF PA. L. REV. 523, which poses the question: Will the law uphold a contract between a workman and his labor-union whereby he agrees for a period of two years not to work in a non-union shop?

[65] See Hearings on Conditions in Coal Fields, 70th Cong., 1st Sess.

[66] Hearings on S. 1482, p. 628.

[67] See N. Dak. Comp. Laws Ann. (Supp. 1925) §7214a3; WASH. COMP. STAT. (Remington, 1922) § 7613; Ore. L. (Olson, 1920) § 6815. The latter two statutes are even more cautious than indicated, as they permit equitable relief not only in case of "irreparable damage" to "property rights" but also to "personal rights".

provided that such contracts are against public policy and void, did not get beyond the lower House; within the next two years similar bills presented in California, Illinois, and Massachusetts failed of passage.[68] In the 1928 session of the New York legislature,[69] such a bill was pressed by the New York State Federation of Labor but died in committee. We may be sure that this is only the beginning of the agitation. Effective recession in the present trend of prosperity is likely to invigorate the demand for legislation.

LEGISLATION AFFECTING EQUITY JURISDICTION

Legislative revision of judicial doctrines of substantive law has, on the whole, proved futile. The influences that for a generation stimulated legislative easing of the sensitized contacts between law and labor therefore began to promote more concrete measures of relief. They sought to meet specific complaints concerning the equity process. The measures that were proposed from time to time and frequently enacted had two main objectives: to narrow the scope of equitable jurisdiction in labor controversies, and to correct procedural evils both in the manner of granting the injunction and in the mode of its enforcement.

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[68] See (1925) 15 AM. LAB. LEG. REV. 228; (1927) 17 *ibid.* 142. The Ohio bill was deemed constitutional by the Attorney General of that state, *ibid.* 143-44. While this book went through the press, the principle of the Ohio bill was enacted into law by Wisconsin. The full text of this new Wisconsin measure deserves quotation:

"SECTION 1. A new section is added to the statutes to read: 103.46 Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in either: (1) a contract or agreement of hiring or employment between any employer and any employe or prospective employe, whereby (a) either party to such contract or agreement undertakes or promises not to join, become or remain, a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes or remains, a member of any labor organization or of any organization of employers; or (2) in a contract or agreement for the sale of agricultural, horticultural or dairy products between a producer of such products and a distributor or purchaser thereof, whereby either party to such contract or agreement undertakes or promises not to join, become or remain a member of any co-operative association organized under chapter 185 or of any trade association of the producers, distributors or purchasers of such products, is hereby declared to be contrary to public policy and wholly void and shall not afford any basis for the granting of legal or equitable relief by any court.

"SECTION 2. This act shall take effect upon passage and publication." Wis. L., 1929, c. 123.

[69] Assembly Bill 562.

Proposals within the first category have the more spirited legislative and judicial history.[70] The three earliest statutes on this phase of our problem and their judicial fate, sufficiently tell the tale. In 1903, a California statute not only eliminated as a criminal offence a combination to do any act in furtherance of a trade dispute, if such act would not be a crime when done by one person alone, and excluded such a combination from the law against restraint of trade, but went on to provide,—"nor shall any restraining order or injunction be issued with relation thereto."[71] Claiming that defendants paraded in front of his place of business, with "unfair" and "don't patronize" placards, to intimidate employees and patrons from entering his place of business, a San Francisco employer applied to the state court for an injunction. The defendants relied upon the terms of the statute,—"nor shall any restraining order or injunction be issued." The trial court issued an injunction, which, with slight modifications, the Supreme Court of California sustained.[72] Yet the statute was not overlooked by the court nor was it found repugnant to any constitutional provision. The statute was "construed":

> "Appellants make the bare statement, without argument, that 'an injunction in this case is one also specifically forbidden by Penal Code, page 581 . . .' but, in the first place, it cannot, in our opinion, be construed as undertaking to prohibit a court from enjoining the main wrongful acts, charged in the complaint in this action; and, in the second place, if it could be so construed, it would to that extent be void

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[70] Legislative measures to curb labor injunctions in Canadian provinces are not within our immediate concern. As to them, see STEWART, CANADIAN LABOR LAWS AND THE TREATY (1926) 161. The recent testimony of Mr. Frey before the Senate Committee on the Judiciary is suggestive of the reflex influence of the American experience upon labor disputes in Canada: "There are some $3,500,000,000 of American capital invested in Canadian industry. The attorneys for these American investors . . . acquaint [the Canadian attorneys] with the methods they are able to apply in American courts of equity. . . ." See Hearings on S. 1482, pp. 656-57.

[71] Calif. Stat. and Amend. to Codes (1903) c. 235; Calif. Gen. Laws (Deering, 1923) Act 1605.

[72] Goldberg etc. Co. *v.* Stablemen's Union, 149 Cal. 429 (1906).

because violation of plaintiff's constitutional right to acquire, possess, enjoy and protect property."[73]

In 1913 and 1914 Arizona and Massachusetts undertook to contract the jurisdiction of their equity courts more comprehensively. The Arizona statute was the more elaborate.[74] First, it prohibited its courts from issuing injunctions "in any case between an employer and employees or between employers and employees . . . involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law." Secondly, it enumerated particular acts that no labor injunction might proscribe: ceasing work or inducing others by peaceful means so to do; peaceful patrolling; ceasing to patronize any party to a labor dispute or inducing others by peaceful means so to do; payment of strike benefits; peaceable assembly; the doing of any act "which might lawfully be done in the absence of such dispute by any party thereto."

Massachusetts followed the phrasing of the first part of the Arizona statute *verbatim,* but added a stiffening provision in order to eliminate the possibility of opening too wide the door which by the permissive clause—"unless necessary to prevent irreparable injury to property"—the Arizona statute left ajar. It defined as follows what was not to be deemed property for purposes of the statute:

> "In construing this act, the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation for employer and employee, and to perform and carry on business in such relation with any person in any place, or to do work and labor as an employee, shall be held and construed to be a personal and not a property right."[75]

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[73] *Ibid.* 434. *Accord:* Pierce *v.* Stablemen's Union, 156 Cal. 70 (1909).

[74] Ariz. Civ. Code (1913) par. 1464.

[75] Mass. Acts (1914), c. 778, § 2, reprinted in Bogni *v.* Perotti, 224 Mass. 152, 153 (1916). See the comment of former President Taft in (1914) 39 A. B. A. Rep. 359, 372, speaking of the Massachusetts Act (subsequently held invalid): "One feels in respect to such an enactment by the conservative, law-abiding Old Bay State, which loves equality and properly prides itself as a government of laws and not men, as the author of the Biglow Papers did with reference to her attitude in the Mexican War, when he said: 'Massachusetts, God forgive her, is a-kneelin' with the rest.'"

"Recognizing every presumption in favor of the validity of statutes enacted by the legislature", the Supreme Judicial Court of Massachusetts found the enactment repugnant to the due process clause of the federal Constitution and equivalent provisions in the state constitution.[76] In withdrawing the protection of equitable remedies from the economic advantages of the employer-employee relationship, the legislation was held to have annihilated the right to carry on business and to have deprived those who possessed such rights from equal protection of the laws.[77]

The Arizona statute had a longer life. In the picturesque mining town of Bisbee, Arizona, one Truax operated a restaurant. When he reduced the pay and increased the hours of his employees, they struck, and, according to the findings of the trial court, used these means to succeed:

> "advertising the existence of the strike by the display of banners, by pickets and the distribution of circulars and loud talking on the streets. The facts advertised . . . are that a strike against the English Kitchen existed; that the said strike was declared and maintained by the defendant union; that the English Kitchen proprietors are 'unfair' to organized labor, because said proprietors have refused to grant union employees fair wages and fair working hours. . . ." [78]

The Supreme Court of Arizona affirmed the dismissal of injunction proceedings against the union and based its decision largely upon the Arizona statute. Peaceful picketing, it was held, was thereby legalized; whether picketing is peaceful or not was a question of fact, and when the trial court had determined that picketing in a particular strike was peaceful, no injunction could issue to restrain it. Truax forthwith began a new suit, this time including as defendants some of the strikers individually as well as their union. The complaint repeated the allegations of the prior action and was again dismissed. On appeal only one question was presented—"the constitutionality of Paragraph 1464 of the Civil Code of Arizona of 1913"—and that was decided in favor of the validity of the statute.[79] The court bluntly admitted that the strike tactics were hurting the plaintiff's business but concluded that the very purpose of the statute was to prevent restraint of such tactics and "to recognize the right of workmen or strikers to use peaceably means to accomplish the lawful ends for which the strike was called."[80] The Supreme Court of Arizona was the only court in 1918 that at once respected the aim of this type of legislation and found in its application no infringement of constitutional guarantees. The subsequent fate of the Arizona statute is entwined with the history of kindred national legislation. The explanation of the final triumph of Truax in the Supreme Court of the United States will seem clearer after a recital of the history of this federal legislation.

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[76] Bogni *v.* Perotti, 224 Mass. 152 (1916). The case is discussed in (1920) 20 COL. L. REV. 696; (1916) 30 HARV. L. REV. 75. In the Senate Hearings on S. 1482 (p. 294), W. G. Merritt testified concerning this decision: "That decision naturally stirred up a great deal of excitement, because it was contrary to what organized labor believed the law to be, and editorials were written by the Federationist, such as: 'Americans, wake up! What shall be done with judges who violate the constitutional rights of labor? Massachusetts court filches labor's rights.'"

[77] A statute almost identical with that of Massachusetts was enacted in Minnesota in 1917, MINN. STAT. (Mason, 1927) § 4258. It has not yet apparently been subjected to review by an appellate court. So also, Ore. L. (Olson, 1920) § 6817.

[78] Truax *v.* Bisbee Local No. 380, 19 Ariz. 379, 389 (1918).

Congressional efforts to cut down the equity jurisdiction of federal courts in labor controversies followed the *Debs Case.* At the turn of the present century, a bill before the House limiting the scope of the term "conspiracy" and partially withdrawing trade disputes from the threat of the Sherman Law, contained the clause "nor shall any restraining order or injunction be issued in relation thereto."[81] The next year a bill with the identical clause passed the House.[82] In the next two Congresses like measures were proposed but without effect.[83] In 1906, the American Federation of Labor addressed to the President, the President of the Senate, and the Speaker of the House what was called a "Bill of Grievances", setting forth in part the following:

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[79] Truax *v.* Corrigan, 20 Ariz. 7 (1918).

[80] *Ibid.* 11.

[81] H. R. 8917, S. 4233, 56th Cong., 1st Sess. The bill will be found in 34 CONG. REC. 2589-90 (1901). A provision, added by the Committee, read: *"Provided,* That the provisions of this act shall not apply to threats to injure the person or the property, business, or occupation of any person . . . to intimidation or coercion, or to any acts causing or intended to cause an illegal interference, by overt acts, with the rights of others." The bill thereupon was defeated upon the insistence of labor leaders themselves. See correspondence in 34 CONG. REC. 2589 *et seq.* (1901).

[82] H. R. 11060, 35 CONG. REC. 4995 (1902).

[83] H. R. 4445, 58th Cong., 1st Sess.; H. R. 6782, H. R. 8136, 58th Cong., 2nd Sess.

> "The beneficent writ of injunction intended to protect property rights has, as used in labor disputes, been perverted so as to attack and destroy personal freedom, and in a manner to hold that the employer has some property rights in the labor of the workmen. Instead of obtaining the relief which labor has sought it is seriously threatened with statutory authority for existing judicial usurpation." [84]

Not less than nineteen bills were introduced in the House and Senate of the Sixtieth Congress. The most significant of these, in view of later developments, was a bill introduced by Mr. Pearre, a Republican Congressman from Maryland.[85] He proposed a complete departure from earlier attempts at reform. Assuming that equity jurisdiction was coterminous with the protection of "property", the Pearre Bill proposed to circumscribe equity by so defining the concept "property" as to exclude the interests that are involved in a labor dispute. After forbidding any federal judge to issue an injunction in any labor dispute, except to prevent irreparable injury to property, the Pearre Bill provided that

> "for the purposes of this Act, no right to continue the relation of employer and employee or to assume or create such relation with any particular person or persons, or at all, or to carry on business of any particular kind, or at any particular place, or at all, shall be construed, held, considered or treated as property or as constituting a property right." [86]

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[84] Reprinted *in toto* in 51 CONG. REC. 16337 (1914). See McMahon, *Review of Platforms Put Forth by the American Federation of Labor* (1920) 65 OHIO L. BULL. 67; FREY, LABOR INJUNCTION 91.

[85] H. R. 94, 42 CONG. REC. 13 (1907).

[86] At a hearing before the House Committee on Judiciary, the counsel for the American Federation of Labor on Feb. 5, 1908, stated: "The bill was considered by at least two sessions of the executive council of that organization and unanimously approved. It was considered by two of its national conventions—the two latest—and by them unanimously indorsed . . . the organization has stood by and is to-day standing by this bill without amendments." Mr. Gompers before the same Committee, on Feb. 28, 1908, said: "Events have demonstrated clearly to my mind that there is only one bill before the committee that can at all

This bill had scarcely been referred to the House Judiciary Committee when President Roosevelt sent a special message to Congress "again" calling its attention "to the need of some action in connection with the abuse of injunctions in labor cases":

> "It is all wrong to use the injunction to prevent the entirely proper and legitimate actions of labor organizations in their struggle for industrial betterment, or under the guise of protecting property rights unwarrantably to invade the fundamental rights of the individual. It is futile to concede, as we all do, the right and necessity of organized effort on the part of wage earners and yet by injunctive process to forbid peaceable action to accomplish the lawful objects for which they are organized and upon which their success depends."[87]

Despite this message and the many bills, the Sixtieth Congress closed without action. That year, 1908, the national conventions were meeting. The Republican platform recognized defects in the procedure leading to injunctions.[88] A broader, if vaguer, paragraph in the Democratic platform [89] was interpreted by Mr. Gompers as an endorsement of the Pearre Bill.[90] In a characteristic public letter, two weeks before the election, President Roosevelt assailed the Pearre Bill:

> "I denounce as wicked the proposition to secure a law which, according to the explicit statement of Mr. Gompers, is to prevent the courts from effectively interfering with riotous violence where the object is to destroy a business, and which will legalize a blacklist and the secondary boycott, both of them the apt instruments of unmanly persecution."[91]

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be effective to deal with this abuse, with this invasion of human rights, and that is the Pearre bill." These two statements are quoted in the public letter of President Roosevelt of Oct. 21, 1908. This letter was reprinted in Hearings before the House Committee on the Judiciary, 62nd Cong., 2nd Sess. (1912) Injunctions, pp. 264, 265.

[87] 42 CONG. REC. 1347-48 (1908).

[88] PROCEEDINGS OF THE FOURTEENTH REPUBLICAN NATIONAL CONVENTION (1908) 89.

[89] "Questions of judicial practice have arisen especially in connection with industrial disputes. We deem that the parties to all judicial proceedings should be treated with rigid impartiality, and that injunctions should not be issued in any cases in which injunctions would not issue if no industrial dispute were involved." PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1908) 168.

[90] Injunctions (1912) Hearings before the House Committee on the Judiciary, 62nd Cong., 2nd Sess., pp. 269-70.

[91] This letter is reprinted, *ibid.* 264. Mr. Gompers' reply appears *ibid.* 272-75.

In the first Congress of President Taft's Administration, twelve bills were introduced seeking modifications of the existing procedure governing labor injunctions. Not one was reported out of committee. Two years later, however, politics were in the lively current of the "Progressive movement", and in the Sixty-second Congress began the steady drive that three years later eventuated in the Clayton Act. The House Judiciary Committee, in January, 1912, opened hearings on injunctive legislation, considering eleven specific bills then pending.[92] The most active measure was the Wilson Bill,[93] identical with the Pearre Bill of the Sixtieth Congress in purpose, scheme and for the greater part in language. Like the Pearre Bill, it forbade the issuance of injunctions in labor disputes, except to prevent irreparable injury to property, defining "property" thus:

> "And for the purposes of this Act no right to continue the relation of employer and employee, or to assume or create such relation with any particular person or persons, or at all, or patronage or good-will in business, or buying or selling commodities of any particular kind or at any particular place, or at all, shall be construed, held, considered, or treated as property or as constituting a property right." [94]

The American Federation of Labor urged this bill on President and Congress.[95] But, after extended hearings, the House

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[92] *Supra* note 90.

[93] H. R. 11032, 62nd Cong., 1st Sess.

[94] See Mr. Andrew Furuseth's testimony at the House Hearings (*supra* note 90 at 110): "What labor is now seeking is the assistance of all liberty-loving men in restoring the common-law definition of property and in restricting the jurisdiction of the equity courts in that connection to what it was at the time of the adoption of the Constitution."

Daniel Davenport, general counsel of the American Anti-boycott Association, in testifying before the Committee: "To say that Congress can declare by statute that not to be property which the uniform decisions of innumerable courts have declared to be property, which the Supreme Court itself has so declared, and which the common sense of mankind instinctively recognized as property, and by so declaring it not to be property to withdraw it from the protection of the processes of law which this bill itself preserves for the protection of all other property is simple nonsense. I say it is useless to spend time in discussing it." (*Ibid.* pp. 294-95.)

[95] See House Hearings (*supra* note 90 at 11). The American Federation Convention of 1911 adopted by unanimous vote the following recommendations: "We recommend that this convention authorize and direct the executive council to urge the President of the United States to recommend in his forthcoming mes-

Committee wholly recast the Wilson Bill, and reported out a new series of proposals[96] which were destined to become the bases of the labor provisions in the Clayton Act. The course of the debates on these proposals, and their vicissitudes, covering a period of over two years from first presentation to the House until final passage by both chambers, is more than historic curio. It is essential to an understanding of the decisions that applied the Clayton Act.

The first three sections of the new bill were regulatory of procedure governing the injunction and the *ex parte* restraining order; these we treat later. Our immediate concern is with the fourth and last section, made up of two paragraphs. The first forbade federal judges from granting an injunction

> "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. . . ."

The bill carried no definition of "property". The second paragraph took a new tack. It catalogued specific acts for which no injunction could issue: terminating employment or persuading others by lawful means so to do; peacefully obtaining or communicating information; "ceasing to patronize or to employ any party to such a dispute" or persuading others by peaceful means

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sage to Congress the amendment of the Sherman antitrust law upon the lines as contained in the Wilson bill; and further, that the executive council be and it is hereby, directed, either as a body or by the selection of a committee thereof, to interview and confer with the President in furtherance of the purpose of this report; and the executive council is hereby further authorized and directed to take such further action as its judgment may warrant to secure the enactment of such legislation at the following session of Congress as shall secure the legal status of the organized movement of the wage workers and its freedom from unjust discrimination in the exercise of their necessary, normal, and constitutional rights through their voluntary associations; and the executive council is further authorized and directed, that, in the event of failure on the part of Congress to enact the legislation which we herein seek at the hands of Congress and the President, to take such action as in its judgment the situation may warrant in the presidential and congressional election of 1912." Reprinted *ibid.* 94.

[96] H. R. 23635, 62nd Cong., 2nd Sess., reported out April 27, 1912, 48 CONG. REC. 5514 accompanied by H. Rep. No. 612 and a minority report, H. Rep. 612, Part 2. The majority report will be found reprinted in 48 CONG. REC. 6458 (1912); the minority report, *ibid.* 6443.

so to do; paying strike benefits; peaceable assembly in a lawful manner for lawful purposes; "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." [97]

The purpose of the bill was set forth in the majority report of the House Judiciary Committee:

> "The second paragraph of section 266c is concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." [98]

Contrariwise, the minority report contended that the second paragraph was "the most vicious proposal of the whole bill" [99] because it authorized the specified conduct regardless of actuating motives. The debate on the floor of the House followed the lines of these reports. The opposition was summarized by Mr. Moon of Pennsylvania:

> "The obvious purpose of this paragraph, Mr. Speaker, is to legalize the modern strike and secondary boycott as instruments of industrial

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[97] This paragraph read as follows: "And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." Reprinted in 48 CONG. REC. 6415 (1912) as H. R. 23635.

The second clause was taken from the British Trade Disputes Act of 1906, the second section of which provided: "It shall be lawful for one or more persons . . . in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from work."

[98] H. Rep. No. 612, 62nd Cong., 2nd Sess.; 48 CONG. REC. 6458 (1912).

[99] H. Rep. No. 612, pt. 2, 62nd Cong., 2nd Sess.; 48 CONG. REC. 6443 (1912).

warfare, and to place the destructive machinery of these dangerous and cunningly devised weapons beyond the preventive power of our courts of justice."[100]

The ablest speech was by John W. Davis, then a member for West Virginia, who supported the bill as an "effort to crystallize into law the best opinions of the best courts."[101]

On May 14, 1912, the bill passed the House as reported.[102] Duly it came before the Senate Judiciary Committee which began hearings thereon the next month, continuing intermittently until February of the following year.[103] Despite much prodding on the floor of the Senate,[104] the bill never emerged from the legislative "morgue".[105] The next Congress ushered in the Wilson era on Capitol Hill as well as at the White House.

In the spring of 1914, the chairman of its Judiciary Committee, Mr. Clayton, reported to the House[106] a bill (H.R. 15657) —"To supplement existing laws against unlawful restraint and monopoly and for other purposes"—section 18[107] of which was the exact replica of the bill passed in the previous House. One amendment only was proposed by the committee: following the catalogue of specific acts that were not to be enjoined, these words were added—"nor shall any of the acts specified in this paragraph be considered or held unlawful."[108]

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[100] 48 Cong. Rec. 6421 (1912).

[101] *Ibid.* 6438.

[102] 48 Cong. Rec. 6470-71 (1912); referred to Senate Committee on Judiciary, *ibid.* 6477.

[103] Hearings before a Subcommittee of the Senate Committee on the Judiciary, 62nd Cong., 2nd Sess. on H. R. 23635 (1912).

[104] Motions to discharge the Committee from further consideration of the bill were made repeatedly, 48 Cong. Rec. 7986, 7987, 8118, 8224, 8246 (1912); 49 Cong. Rec. 2685, 2686 (1913). The Senate at this time was Republican, the House was Democratic. See 51 Cong. Rec. 9272 (1914).

[105] 51 Cong. Rec. 9272 (1914).

[106] H. Rep. No. 627, 63rd Cong., 2nd Sess., to accompany H. R. 15657; 51 Cong. Rec. 8200 (1914).

[107] Reprinted in 51 Cong. Rec. 9611 (1914).

[108] 51 Cong. Rec. 9652 (1914). Mr. Webb's explanation follows: ". . . having recognized and legalized the acts set forth in section 18, so far as the conscience side of the court is concerned, the committee feels that no harm can come from making those acts legal on the law side of the court, for anything that is permitted to be done in conscience ought not be made a crime or forbidden in law." *Ibid.* 9653.

The section produced a cross-fire of opposition—"nothing whatsoever for labor's benefit" would be accomplished because it was operative only between an employer and employees, a relationship that terminated in case of strike or lockout; [109] too much was accomplished because prohibition of injunctions against "ceasing to patronize . . . or persuading others by peaceful means so to do" legalized the secondary boycott.[110] The argument in support of the section was briefly that "everything set forth in section 18 is the law to-day" [111] and that the section was not intended to legalize the secondary boycott.[112]

We have already had occasion to note the diversity of meanings which has overlaid the label "secondary boycott".[113] The debates on this measure illustrate these accretions of ambiguity. The leaders on both sides, Mr. Webb in support, and Mr. Volstead in opposition, were in accord in their abhorrence of a "secondary boycott". But while the latter rhetorically asked "Can it be questioned that . . . [section 18 as amended] will legalize the secondary boycott?"[114]—the former was so "perfectly satisfied" that the section did not authorize the secondary boycott, that he declined to accept an amendment to clarify the point further.[115] The statute itself scrupulously avoided the words "secondary boycott" which would unavoidably have imported ambiguity. The words used were descriptive of conduct, and not a phrase that to many conveyed inseparably the significance of illegality.[116]

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[109] Mr. Madden, 51 CONG. REC. 9082 (1914). This argument was made many times, 51 CONG. REC. 9654-55. Mr. Murdock of Kansas framed the difficulty in this way: "The gentleman . . . knows that under this paragraph there are several kinds of classes to which are granted exemption; that is, cases between employer and employees, between employers and employees, and between two sets of employees, and between persons employed and persons seeking employment; but none of these classes of cases, to my mind, include strikers. And it was the strike which caused this proposition to be offered." Mr. Floyd of Arkansas answered as follows: "I can not agree with the gentleman from Kansas that when strikers temporarily quit work, demanding better terms and conditions before they resume, that the relation of employer and employee has ceased. It may have ceased temporarily, but this broad language used in the provision would undoubtedly include them." *Ibid.* 9655. Mr. Madden of Illinois said: "And when anyone argues that the words 'employer and employees' will be held to mean those previously holding the relation, the courts will refuse to so radically change and extend the meaning." *Ibid.* 9496.

[110] 51 CONG. REC. 9652, 9658 (1914). Mr. Moon of Pennsylvania, from the House Committee on the Judiciary (H. Rep. 612, pt. 2, 62nd Cong., 2nd Sess.) submitted the following as the views of the minority: ". . . this section would prevent the issuance of the injunction in the Debs case (In re Debs, 158 U. S. 564); it would prevent the issuance of the injunction in Toledo & Ann Arbor *v.* Pennsylvania Co. (54 Fed., 730); it would prevent the issuance of any injunction to restrain either workmen or employers who were the objects of the most vicious form of boycott that has been passed upon by the courts, or can be devised by the ingenuity of boycotters."

[111] 51 CONG. REC. 9653 (1914).

[112] *Ibid.* 9652-53, 9658.

[113] *Supra* Chapter I, p. 42.

The bill, as amended, passed the House on June 5, 1914.[117] In the Senate, it was promptly referred to its Judiciary Committee, reported out on July 22, 1914,[118] and with some modifications of phraseology[119] it was finally passed on September 2,

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[114] 51 Cong. Rec. 9658 (1914).

[115] *Ibid.* The same difficulties and confusion prevailed in the Senate, *ibid.* 15945. Mr. Albert H. Walker of New York, testifying before a Subcommittee of the Senate Committee on the Judiciary, *supra* note 103, at 631:

"Chairman. The bill as I read it, does not exempt the so-called secondary boycott from injunctions.

"Mr. Walker. I think it does.

"Chairman. Where it says: No such restraining order or injunction shall prohibit any person or persons from ceasing to patronize or to employ any party to such dispute.

"Mr. Walker. But to go to the last words of the sentence, 'or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto', that covers secondary boycotting like a blanket and exempts it from injunctions."

[116] The clause "ceasing to patronize or advising others by peaceful means so to do", Mr. Webb thus interpreted: ". . . it does authorize persons to cease to patronize the party to the dispute and to recommend others to cease to patronize that same party to the dispute . . . we confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute." 51 Cong. Rec. 9658 (1914).

[117] *Ibid.* 9911 (1914).

[118] *Ibid.* 12468.

[119] These changes were made: (1) to the privilege of terminating employment was added the phrase "whether singly or in concert". 51 Cong. Rec. 14330 (1914); (2) the clause specifying unenjoinable conduct—"attending at or near a house or place where any person resides or works or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information" was dropped, *ibid.* 14330, and later replaced by this clause: "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working"; (3) "ceasing to patronize . . . or persuading others by peaceful means so to do" was changed to include the words "and lawful" after "peaceful", *ibid.* 14331; (4) "peaceably as-

1914.[120] The conferees of the two Houses submitted their report[121] which was accepted by the Senate, October 5, 1914,[122] and by the House three days later.[123] By President Wilson's signature on October 15, 1914, the measure known to history as the Clayton Act became law.[124]

This completes in barest outline a sketch of legislative proposals to curb equity jurisdiction, which, from 1894 to 1914, engaged the attention of every Congressional session but one. If such continuous effort and travail in the evolution of a single measure[125] reveal any deliberate purpose, they justify the pre-

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sembling at any place" was changed by dropping the words "at any place", *ibid.* 14331; (5) the provision that none of the specifically unenjoinable conduct shall be held "unlawful" was changed by adding after the word "unlawful", "under the laws of any State in which the act was committed", *ibid.* 14367. This was eventually modified to read: "shall . . . be considered or held to be violations of any law of the United States."

[120] 51 CONG. REC. 14610 (1914).

[121] Sen. Doc. No. 585, reprinted *ibid.* 15637.

[122] *Ibid.* 16170.

[123] *Ibid.* 16344.

[124] § 20 of this Act (now 29 U. S. C. § 52 (1926)) reads as follows: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. (Oct. 15, 1914, c. 323, § 20, 38 STAT. 738)."

[125] We take the following summary of references to Congressional Debates and

sumption that Congress was long conscious of abuses in issuing injunctions and that this legislation embodied a solution.[126] Five days after its enactment, however, the then President of the American Bar Association, in his annual address, gave warning of impending pitfalls:

> "All these provisions have been called the charter of liberty of labor. We have seen that the changes from existing law they make are not broadly radical and that most of them are declaratory merely of what would be law without the statute. This is a useful statute in definitely regulating procedure in injunctions and in express definition of what may be done in labor disputes. But what I fear is that when the statute is construed by the courts it will keep the promise of the labor leaders to the ear and break it to the hope of the ranks of labor." [127]

Hearings from Mr. Justice Brandeis' dissenting opinion in Truax *v.* Corrigan, 257 U. S. 312, 354, 369, n. 39 (1921); "53rd Congress: resolutions to investigate the use of the injunction in certain cases, 26 CONG. REC. 2466; 56th Congress: debate, 34 CONG. REC. 2589; 60th Congress: hearings, Sen. Doc. 525; special message of the President, Sen. Doc. 213, 42 CONG. REC. 1347; papers relating to injunctions in labor cases, Sen. Docs. 504 and 524; 61st Congress: debate, 45 CONG. REC. 343; 62nd Congress: debate, 48 CONG. REC. 6415-6470; hearings, Sen. Doc. 944; petitions, Sen. Doc. 440; hearings before the House Committee on the Judiciary, Jan. 11, 17-19, February 8, 14, 1912; hearings before a subcommittee of Senate Committee on the Judiciary, 62nd Congress, 2nd sess.; 63rd Congress, see debates on H. R. 15657 (the Clayton Act)."

[126] Judge Amidon drew the following comparison between § 20 of the Clayton Act and § 2 of the English Trade Disputes Act of 1906: "The form in which they are framed differs, but their legal effect is the same. The English statute says that 'it shall be lawful' to do the specific acts mentioned in each of the statutes. This, as a necessary inference, forbade the courts to issue injunctions restraining workmen from doing those acts. The American statute reverses this order. It expressly forbids courts to issue injunctions or restraining orders forbidding workmen to do the acts specified in section 20, and then in its last clause declares as follows: 'Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.' Our statute forbids expressly the issuing of injunctions against the doing of the acts, and also declares that the doing of the same shall not be construed or held to be a violation of federal law. The English act, without expressly dealing with the subject by forbidding injunctions, does so impliedly by conferring upon employés in the case of a trade dispute the right to do the acts. The only difference in the two statutes is that our law is express on the subject of forbidding injunctions in the cases specified, while the English statute accomplishes the same result by implication." Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414, 417 (D. N. Dak., 1923).

[127] (1914) 39 A. B. A. REP. 359, 380. Other discussions of the Act prior to any controlling judicial construction are the following: Davenport, *An Analysis of the Labor Sections of the Clayton Anti-Trust Bill* (1915) 80 CENT. L. J. 46; Witte,

This prophet was himself destined to become Chief Justice of the Court that gave final meaning to the Clayton Act and determined the limits of legislative power in prescribing remedies for injunctive abuses.

Between 1916 and 1920, in thirteen cases[128] in which opinions are reported, lower federal courts applied section 20 of the Clayton Act. In ten of these cases, the statute was held not to stand in the way of an injunction. This surprising result was based on two independent and inconsistent constructions: first, that section 20 did not change the pre-existing law;[129] second, that the section did create new privileges but extremely limited in scope. Thus, the statute was held inapplicable when the strike was to unionize a factory or, generally, for a purpose other than immediate betterment of working conditions. To refuse to work upon non-union products was deemed a strike "for a whim", not sheltered by the Clayton Act and subjecting the defendants to "those settled principles respecting organized picketing."[130] Again, the Act could not be invoked when once the employer had refilled vacancies: persons who continued to strike and picket thereafter were no longer "employees" protected by the Clayton Act.[131] Finally, hostility to all picketing was too deeply ingrained in

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The Doctrine that Labor is a Commodity (1917) 69 Am. Academy of Pol. & Soc. Sci. Ann. 133; *The Clayton Bill and Organized Labor* (1914) 32 Survey 360; Note (1917) 30 Harv. L. Rev. 632.

[128] Alaska S. S. Co. *v.* International Longshoremen's Ass'n, 236 Fed. 964 (D. Wash., 1916); Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1916); Stephens *v.* Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917); Kroger Grocery & B. Co. *v.* Retail Clerks' I. P. Ass'n, 250 Fed. 890 (D. Mo., 1918); Montgomery *v.* Pacific Electric Ry. Co., 258 Fed. 382 (C. C. A. 9th, 1919); Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1920); Vonnegut Machinery Co. *v.* Toledo Machine & Tool Co., 263 Fed. 192 (N. D. Ohio, 1920); Langenberg Hat Co. *v.* United Cloth Hat and Cap Makers, 266 Fed. 127 (D. Mo., 1920); King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257 (C. C. A. 6th, 1920); Herkert & Meisel T. Co. *v.* United Leatherworkers' I. U., 268 Fed. 662 (E. D. Mo., 1920). The cases in which the injunction was denied: Puget Sound Traction Light & Power Co. *v.* Whitley, 243 Fed. 945 (W. D. Wash., 1917); Duplex Printing Press Co. *v.* Deering, 247 Fed. 192 (S. D. N. Y., 1917); Kinloch Telephone Co. *v.* Local Union No. 2, 265 Fed. 312 (E. D. Mo., 1920).

[129] Stephens *v.* Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917).

[130] Vonnegut Machinery Co. *v.* Toledo Machine & Tool Co., 263 Fed. 192, 201-03 (N. D. Ohio, 1920).

[131] Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 192 (N. D. Ohio, 1920).

the mental habits of some of the federal judges to yield to the language of the Clayton Act. Instead, it continued to supply canons of interpretation.[132] An attitude deriving from assumptions like this—"practical people question the possibility of peaceful persuasion through the practice of picketing",[133] found no difficulty in clothing every reasonably effective strike activity in language synonymous with illegality.[134]

Not until 1921 [135] did litigation reach the Supreme Court calling for its pronouncement upon the Clayton Act. But in June of 1917, the intimation of Mr. Justice Holmes in *Paine Lumber Co.* v. *Neal*,[136] and a dissenting opinion in that case, foreshadowed the Court's construction of the Act. Because the material manufactured by plaintiffs was not made by union labor, defendant unions (whose members, however, were not in plaintiff's employ) refused to work upon it. To restrain their conduct, plaintiffs sought an injunction against them. Disagreeing with the majority of the Court that the Clayton Act was inapplicable because the litigation antedated it, the dissenting Justices argued that an injunction should issue because they did not find "in § 20 of the Clayton Act anything interfering with the right of the complainants to an injunction." [137] This opinion yielded to the reasoning we have just summarized from the opinions in the lower federal courts: the section did not apply because there was no relation of employer and employee between the parties in the case, and because there was no dispute between them as to conditions of employment; the section only sanctioned "lawful" measures—"that is, of course, measures that were lawful before the Act." [138] These views were transmuted into decisions in two cases which fixed the meaning of section 20.[139]

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[132] As to the attitude of courts generally towards legislation, see Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383.

[133] Vonnegut Machinery Co. *v.* Toledo Machine & Tool Co., 263 Fed. 192 (N. D. Ohio, 1920).

[134] See Montgomery *v.* Pacific Electric Ry. Co., 258 Fed. 382 (C. C. A. 9th, 1919); Vonnegut Machinery Co. *v.* Toledo Machine & Tool Co., 263 Fed. 192 (N. D. Ohio, 1920); Langenberg Hat Co. *v.* United Cloth Hat and Cap Makers, 266 Fed. 127 (D. Mo., 1920).

[135] Duplex Co. *v.* Deering, 254 U. S. 443 (1921).

[136] Paine Lumber Co. *v.* Neal, 244 U. S. 459 (1917). This case has been considered, *supra* p. 145.

[137] *Ibid.* 484.

[138] *Ibid.* 485.

In *Duplex Printing Press Co.* v. *Deering*, an injunction was sought to restrain the Machinists' and affiliated unions from interfering with plaintiff's business by inducing their members not to work for the Duplex Company, or its customers, in connection with the hauling, installation and repair of printing presses made by the Company.[140] There was a strike pending against the Company to secure the closed shop, an eight-hour day, and a union scale of wages. The decision of the District Court dismissing the bill [141] was affirmed by a majority of the Circuit Court of Appeals for the Second Circuit.[142] Judge Hough was clear that section 20, if applicable to the litigation, forbade the granting of an injunction. His only doubt was as to the applicability of the section: "Is the present litigation one between employers and employés or *an* employer and employés, growing out of a dispute concerning terms *or* conditions of employment?" [143] He held it was. There was a dispute; it concerned conditions of labor; it was a dispute between employer and employees, although only "a dozen or so" of the plaintiff's own employees were on strike. "In strict truth", wrote Judge Hough,

> "this is a dispute between two masters, the union, or social master, and the paymaster; but, unless the words 'employers and employés', as ordinarily used, and used in this statute, are to be given a strained and unusual meaning, they must refer to the business class or clan to which the parties litigant respectively belong." [144]

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[139] The Hitchman Coal Company Case, 245 U. S. 229, decided Dec. 10, 1917, did not consider the applicability of the Clayton Act, since the final decree had issued Jan. 18, 1913 (202 Fed. 512 (N. D. W. Va.)). See Kroger Grocery & B. Co. *v.* Retail Clerks' Ass'n, 250 Fed. 890 (D. Mo., 1918); Kinloch Telephone Co. *v.* Local Union No. 2, 265 Fed. 312, 320 (D. Mo., 1920). But *cf.* Montgomery *v.* Pacific Electric Ry. Co., 258 Fed. 382, 388-89 (C. C. A. 9th, 1919).

[140] The conduct of the union is detailed fully in the opinion of the trial court, 247 Fed. 192 (S. D. N. Y., 1917) and in the opinion of Judge Rogers, on appeal, 252 Fed. 722 (C. C. A. 2nd, 1918). It must be remembered that counsel for the plaintiff requested the court not to consider any evidence of violence or threats of violence in deciding upon the legality of the defendants' conduct, 252 Fed. at 746.

[141] Duplex Printing Press Co. *v.* Deering, 247 Fed. 192 (S. D. N. Y., 1917).

[142] Duplex Printing Press Co. *v.* Deering, 252 Fed. 722 (C. C. A. 2nd, 1918).

[143] *Ibid.* 747.

[144] *Ibid.* 748. The majority opinion of the Supreme Court answered the point as follows: "We deem this construction altogether inadmissible. . . . Congress

Meaning that to Judge Hough was "strained and unusual" a majority of the Supreme Court found easy and obvious, and all his conclusions were rejected.[145] Their reasoning took this course: irreparable injury "to property or to a property right" includes injury to an employer's business; the privileges of section 20 did not extend to defendants who had never been in the relationship of employee to the plaintiff or sought employment with him, because it did not apply "beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of the dispute"; [146] furthermore, analyzing the specific exemption invoked [147]—"ceasing to patronize . . . or persuading others by peaceful and lawful means so to do"—the Court concluded that the instigation of a strike against an employer who was at peace with his own employees, solely to compel such employer to withdraw his patronage from the plaintiff with whom there was a dispute "cannot be deemed 'peaceful and lawful' persuasion." [148] The dissenting opinion of Mr. Justice Brandeis (in which Holmes and Clarke, JJ. concurred) refused to confine the scope of the exemptions of section 20 merely within the area of a legal relationship between a specific employer and his employees, both by reason of the wording of the statute and by virtue of the fact that "the very acts to which it applies sever the continuity of the legal relationship." [149] Finding that the economic relation of the parties

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had in mind particular industrial controversies, not a general class war." 254 U. S. at 471-72.

[145] *Ibid.* 443. Pitney, J., wrote the majority opinion, which was concurred in by White, C. J., McKenna, Day, Van Devanter, McReynolds, JJ. Brandeis, J., wrote the dissenting opinion, which was concurred in by Holmes and Clarke, JJ. The case is considered in (1921) 34 HARV. L. REV. 880; MASON, ORGANIZED LABOR AND THE LAW (1925) 203 *et seq.;* Sayre, *The Clayton Act Construed* (1921) 45 SURVEY 597.

[146] 254 U. S. at 472.

[147] See Powell, *The Supreme Court's Control over the Issue of Injunctions in Labor Disputes* (1928) 13 ACADEMY OF POL. SCI. PROC. 37, 51.

[148] 254 U. S. at 473, 474.

[149] "But Congress did not restrict the provision to employers and workingmen *in their employ*. By including 'employers and employees' and 'persons employed and persons seeking employment' it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies

brought them within section 20, the dissenting Justices concluded that it did exempt from injunctive process instigation to strike in aid of persons with whom there is a unity of economic interest. Such unity was disclosed by the actual circumstances of the case. After a detailed analysis of the facts, the minority of the Court thus summarized the economic justification for conduct which the majority held subject to an injunction: ". . . in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."[150]

Thus ended the litigation which gave the pitch to all future readings of the Clayton Act. How much of the life of a statute dealing with contentious social issues is determined by the general outlook with which judges view such legislation, lies on the very surface of the *Duplex Case*. Thirteen federal judges were called upon to apply the Clayton Act to the particular facts of this case. Six found that the law called for a hands-off policy in the conflict between the Duplex Printing Company and the Machinists; seven found that the law called for interference against the Machinists. The decision of the majority of the Supreme Court is, of course, the authoritative ruling. But informed professional opinion would find it difficult to attribute greater intrinsic sanction for the views of the seven judges, White, McKenna, Day, Van Devanter, Pitney, McReynolds and Rogers than for the opposing interpretation of the six judges, Holmes, Brandeis, Clarke, Hough, Learned Hand and Manton.

Statutory construction in doubtful cases, in the last analysis, is a choice among competing policies as starting points for reasoning. This is the real explanation of the conflict of opinion in the *Duplex Case*. But even without a critique of the policy which the majority adopted, two general observations may be made. A difference of judgment upon the facts of the controversy between the Duplex Company and the Machinists might readily have brought the situation within the Court's own requirement that, to enjoy immunity, defendants must be "affected in a proximate and substantial, not merely a sentimental or sympathetic,

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sever the continuity of the legal relationship." Brandeis, J., *ibid.* 487-88. *Cf.* the Congressional debates on this very question, *supra* p. 161.

[150] *Ibid.* 482.

sense by the cause of the dispute."[151] Secondly, by using the "secondary boycott" as the concept governing the decision, the Court imported the term of multiple meaning which Congress had kept out of its legislation. The crux of the *Duplex Case* was interference by New York unionists with work in New York on Duplex machines in the course of a controversy against the Duplex Company in Battle Creek, Michigan. This is the familiar case of refusal to work upon non-union made goods within the same industry. Whether as part of an industrial conflict between the Duplex Company and the Machinists' Union, unionists in New York should be allowed to exercise their power of economic coercion by seeking to interfere with the installation of Duplex presses, is an issue about which men will naturally differ. On this issue, judges might give different answers, but they will be talking about the same thing. To attempt, however, to decide the propriety of a "secondary boycott" is to leave definiteness of fact for ambiguity of phrasing. For to talk about "secondary boycott" is to become involved in a confusion of terms, and, therefore, in a confusion of thought.[152].

At the time of the Duplex decision, there was pending before the Supreme Court *American Steel Foundries* v. *Tri-City Central Trades Council.*[153] This case presented for review an injunction that issued from a district court as a restraint upon "persuasion" and "picketing", and was modified by the Circuit Court of Appeals to permit "persuasion" and to restrain only "picketing in a threatening or unlawful manner." [154] The Supreme Court, it will be recalled,[155] affirmed the first modification but reversed the second. The Court was of opinion that "the name 'picket' indicated a militant purpose inconsistent with peaceable persuasion", and that "the presence of groups of pickets" [156] resulted "in inevitable intimidation." While professing "every regard to the congressional intention manifested in the act", the Court, following the *Duplex Case,* held that section 20 "introduces no new principle into the equity jurisprudence of those [federal] courts," and "is merely declaratory of what was the best practice always." It, therefore, concluded that picketing as the case revealed it, "is unlawful and cannot be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it."

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[151] Compare the facts as summarized by Mr. Justice Brandeis: "There are in the United States only four manufacturers of such presses; and they are in active competition. Between 1909 and 1913 the machinists' union induced three of them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open shop principle; refused to introduce the eight-hour day and operated for the most part, ten hours a day; refused to establish a minimum wage scale; and disregarded other union standards. Thereupon two of the three manufacturers who had assented to union conditions, notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer." *Ibid.* 479-80.

[152] Professor T. R. Powell observes that since the Clayton Act granted for the first time the right of injunction under the Sherman Law to private parties, Pitney, J., was in error in viewing § 20 as a restriction on old equity powers, rather than as a limitation on a new addition to equity powers. (1928) 13 ACADEMY OF POL. SCI. PROC. 54. Of course, this point cannot be made where federal jurisdiction obtains for any reason other than the Sherman Law.

[153] 257 U. S. 184 (1921).

The Court ruled that section 20 was intended merely as "declaratory of what was the best practice always." In condemning "picketing", the Court relies on "many well reasoned authorities", while conceding "there has been contrariety of view." But it does not articulate the criteria by which it determined what, in the intention of Congress, "was the best practice." Again, the opinion repeats the technique in the *Duplex* decision, in that it characterizes conduct with a word that to the Court carries evil connotation, inhibits the conduct because of the label and supports the result by the observation that "Congress carefully refrained from using" "the sinister name of 'picketing'" in section 20.

While protecting "the right of the employer incident to his business and property to free access" of his employees, the Court also recognized the right of strikers to persuade those working for an employer "to join the ranks of his opponents in a lawful economic struggle." How are such conflicting rights to be reconciled? The Court gave this answer:

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[154] Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th 1916).

[155] *Supra* p. 97.

[156] "'Singly or in concert', says the Clayton Act. 'Not together, but singly', says the Chief Justice in interpreting it." T. R. Powell, *supra* note 152 at 56.

> "Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases." [157]

Thus, the Court derived from the Clayton Act privileges of persuasion not only for the actual strikers, who were former employees of the complainant, but also for members of the defendant unions who were neither former nor prospective employees of the complainant. The concession was drawn from broad considerations:

> "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was

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[157] 257 U. S. at 206-07.

worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood."[158]

This enlightened analysis by Chief Justice Taft of the social justification of trade unions writes its own commentary upon the ruling in the *Duplex Case*. Is the interest of members of a national union who threaten a strike in New York in aid of a strike by fellow-members in Michigan against an employer there, whose continued resistance to the union was "threatening the standing of a whole organization and the standards of all its members" merely interest in a "sentimental or sympathetic, sense?" The justification of a substantial common concern so clearly expounded by the Chief Justice was present in the *Duplex* as well as in the *Tri-City Case,* unless the Court rested the differences in result between the two cases upon the fact that in the *Tri-City Case* the stage of the controversy was confined to a smaller geographic area.

Following the *Duplex Case,* we find more than twenty decisions[159] in the lower federal courts, counting only reported cases, that sanction the issuance of an injunction notwithstanding section 20 of the Clayton Act. The opinions add little to the doctrines we have canvassed. According to them, such immunities as the Clayton Act formulated do not apply to union organizers who operate in non-union territories, for they are neither employees nor ex-employees, but rank "outsiders".[160] The immunities do not operate when "persuasion" would hinder some industry engaged in interstate commerce or is incidental to an "unlawful conspiracy".[161] They do not operate when the strike is practically over and the plant is operating on a normal basis.[162] Nor do they sanction persuasion to break a contract of employment or a contract not to join a union.[163] One district court actually held that the immunities of section 20 do not extend to striking employees because the very act of striking terminates the relationship of employer and employee.[164] When the exemptions are

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[158] *Ibid.* 209.

[159] Buyer *v.* Guillan, 271 Fed. 65 (C. C. A. 2nd, 1921); Quinlivan *v.* Dail-Overland Co., 274 Fed. 56 (C. C. A. 6th, 1921); Charleston Dry Dock & Machine Co. *v.* O'Rourke, 274 Fed. 811 (D. S. Car., 1921); Kinloch Telephone Co. *v.* Local Union No. 2, 275 Fed. 241 (C. C. A. 7th, 1922); Gasaway *v.* Borderland Coal Corporation, 278 Fed. 56 (C. C. A. 7th, 1921); Lyons *v.* United States Shipping Board E. F. Corp., 278 Fed. 144 (C. C. A. 5th, 1922); Central Metal Products Corporation v. O'Brien, 278 Fed. 827 (N. D. Ohio, 1922); Portland Terminal Co. *v.* Foss, 283 Fed. 204 (D. Maine, 1922), *rev'd* 287 Fed. 33 (C. C. A. 5th, 1923); United States *v.* Railway Employees' Dept. A. F. L., 283 Fed. 479, 286 Fed. 228 (N. D. Ill., 1922); Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557 (D. Mont., 1922); Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414 (D. N. Dak., 1923); New York, N. H. & H. R. Co. *v.* Railway Employees' Dept., 288 Fed. 588 (D. Conn., 1923); United States *v.* Taliaferro, 290 Fed. 214 (W. D. Va., 1922), *aff'd* 290 Fed. 906 (C. C. A. 4th, 1923); Montgomery *v.* Pacific Electric Ry. Co., 293 Fed. 680 (C. C. A. 9th, 1923); J. I. Haas, Inc. *v.* Local

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Union No. 17, *etc.*, 300 Fed. 894 (D. Conn., 1924); Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993 (N. D. Ill., 1924); Waitresses' Union, Local No. 249 *v.* Benish Restaurant Co., Inc., 6 F. (2d) 568 (C. C. A. 8th, 1925); International Organization *v.* Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927), *certiorari* denied 275 U. S. 536 (1928); Columbus Heating & Ventilating Co. *v.* Pittsburgh Bldg. T. C., 17 F. (2d) 806 (W. D. Pa., 1927); Minerich *v.* United States, 29 F. (2d) 565 (C. C. A. 6th, 1928).

[160] Montgomery *v.* Pacific Electric Ry. Co., 293 Fed. 680 (C. C. A. 9th, 1923); Waitresses' Union, Local No. 249 *v.* Benish Restaurant Co., Inc., 6 F. (2d) 568 (C. C. A. 8th, 1925); International Organization *v.* Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927); Ferguson *v.* Peake, 18 F. (2d) 166 (Ct. of App. D. C., 1927). See Note *Picketing by Labor Unions in the Absence of a Strike* (1927) 40 HARV. L. REV. 896.

[161] United States *v.* Railway Employees' Dept. A. F. L., 283 Fed. 479 (N. D. Ill., 1922); United States *v.* Railway Employees' Dept. A. F. L., 286 Fed. 228 (N. D. Ill., 1923); Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993 (N. D. Ill., 1924).

[162] Quinlivan *v.* Dail-Overland Co., 274 Fed. 56 (C. C. A. 6th, 1921). It is of interest here to note the Wisconsin statute which defined "when a strike is in progress": "A strike or lockout shall be deemed to exist as long as the concomitants of a strike or lockout exist; or unemployment on the part of the workers affected continues; or any payments of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." WIS. STAT. (1927) § 103.43 (1a).

[163] Charleston Dry Dock & Machine Co. *v.* O'Rourke, 274 Fed. 811 (E. D. S. Car., 1921); International Organization *v.* Red Jacket C. C. & C. Co., 18 F. (2d) 837 (C. C. A. 4th, 1927); *certiorari* denied 275 U. S. 536 (1928).

[164] Canoe Creek Coal Co. *v.* Christinson, 281 Fed. 559 (D. Ky., 1922). This case was reversed on another ground, *sub. nom.* Sandefur *v.* Canoe Creek Coal Co., 293 Fed. 379 (C. C. A. 6th, 1923), 266 U. S. 42 (1924).

applicable, they have been held neither inclusive enough to sanction the use of the word "scab" nor to permit utterance of bad language.[165] Unreported decrees, so far as available, are not only cumulative; they emphasize the tendencies here traced.

If, after this judicial experience, anything survived of the roseate hopes aroused by the Clayton Act, it evaporated on April 11, 1927. On that day, in the *Bedford Cut Stone Case*[166] the Supreme Court ordered an injunction against the Journeymen Stone Cutters Association to restrain simple refusal to work upon stone which had been partly cut at the quarries by men working in opposition to the Association. The application which the courts made of the Sherman Law and the Clayton Act in labor controversies is, indeed, a study in irony upon which the dissenting opinion in the *Bedford Case* makes these reflections:

> "If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraint upon labor which reminds of involuntary servitude. The Sherman Law was held in *United States* v. *United States Steel Corporation,* 251 U. S. 417, to permit capitalists to combine in a single corporation 50 per cent. of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so."[167]

And the process by which this ironic effect was achieved, Mr. Justice Stone elucidates in his separate opinion:

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[165] United States *v.* Taliaferro, 290 Fed. 214 (D. Va., 1922), *aff'd* 290 Fed. 906 (C. C. A. 4th, 1923).

[166] 274 U. S. 37 (1927). The majority opinion written by Mr. Justice Sutherland was concurred in by Taft, C. J., Van Devanter, McReynolds, Butler, JJ. Separate concurring opinions were written by Sandford and Stone, JJ. Mr. Justice Brandeis wrote a dissenting opinion, in which concurred Holmes, J.

[167] Brandeis, J., dissenting, 274 U. S. at 65. See Frey, *The Double Standard in Applying the Sherman Act* (1928) 18 Am. Lab. Leg. Rev. 302.

> "As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. But in *Duplex Printing Press Co.,* v. *Deering,* 254 U. S. 443, these views were rejected by a majority of the court and a decree was authorized restraining in precise terms any agreement not to work or refusal to work, such as is involved here. Whatever additional facts there may have been in that case, the decree enjoined the defendants from using 'even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, . . .' (p. 478). These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority."[168]

The Clayton Act was the product of twenty years of voluminous agitation. It came as clay into the hands of the federal courts, and we have attempted a portrayal of what they made of it. The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially.[169]

But the Supreme Court of the United States controls the law of injunctions not only in the federal courts. The Fourteenth

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[168] 274 U. S. at 55-56.

[169] Since this conviction has gathered, efforts in Congress have been renewed. Beginning with the Sixty-sixth Congress, the following bills to affect equity jurisdiction in labor disputes have been proposed: H. R. 7783, H. R. 7784, 66th Cong., 1st Sess.; H. R. 12622, 67th Cong., 2nd Sess.; H. R. 3208, H. R. 8663, 68th Cong., 1st Sess.; S. 972, H. R. 3920, 69th Cong., 1st Sess; S. 1482, H. R. 10082, 70th Cong., 1st Sess. During the Seventieth Congress, 1st Session, extensive hearings were held by the Senate Judiciary Committee. See Hearings on S. 1482 Limiting Scope of Injunctions in Labor Disputes (1928). See (1928) 10 LAW AND LABOR 3 for comment against the latest bills; *ibid.* 169, an article entitled *Labor and the Political Conventions,* which contrasts the platforms of the Republicans and Democrats in the 1928 national election.

Amendment—the protection of due process and the guaranty of the equal protection of the laws—gives to the Supreme Court the last word not merely over new policies of substantive law affecting industrial relations. Through the Amendment, the Supreme Court also scrutinizes legislation regulating the scope of equitable relief afforded by states in local labor disputes. We have already examined the decisions by the respective state courts upon legislation dealing with this subject in California, Massachusetts and Arizona.[170] The California statute, we saw, was so interpreted as to create no substantial contraction of equitable jurisdiction; the Massachusetts statute was invalidated; the Arizona law was construed to permit peaceful picketing and, so construed, was sustained. Only the Arizona decision reached the Supreme Court, and on the ground that it contravened the protections of the Fourteenth Amendment. While, in language, the Arizona statute was practically identical with section 20 of the Clayton Act,[171] the meaning which the Arizona Court had placed upon it led to its invalidation by the Supreme Court.[172]

The policy of Arizona, formulated by its legislature and sustained by its court, refused relief[173] for the following conduct by strikers: verbal castigation of employers, their business, their employees and their customers; use of epithets; patrolling in front of plaintiffs' business continuously during business hours with banners announcing plaintiffs' unfairness by insulting and loud appeals.[174]. All this, the Supreme Court ruled, was "moral coercion by illegal annoyance and obstruction . . . plainly a conspiracy"[175] and as such a deprivation of plaintiffs' property without due process of law. And, in reply to the contention that the Arizona statute did not withhold from the plaintiffs all remedies but only the relief of injunction, the Court found a denial of the equal protection of the laws.[176] It was held discriminatory to withdraw the right to resort to equity in this class of cases and to continue that right in other cases. The statute drew a distinction between former employees and other tort feasors, and this the Court held an unreasonable classification. In the language of the Chief Justice:

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[170] *Supra* pp. 151-154.

[171] The Arizona statute is identical with the Clayton Bill as first reported to Congress and prior to its amendment on the floor and in conference committee. See *supra* note 97.

[172] Truax *v.* Corrigan, 257 U. S. 312 (1921). This decision is criticized adversely in (1922) 10 CALIF. L. REV. 237; (1922) 22 COL. L. REV. 252; (1922) 31 YALE L. J. 408.

[173] Of course, no theretofore unlawful conduct was legalized by this statute; it merely withdrew the right of injunction against certain specified acts. Thus, Pitney, J., in his dissenting opinion was compelled to observe: "Paragraph 1464 does not modify any substantive rule of law, but only restricts the processes of the courts of equity. Ordinary legal remedies remain; and I cannot believe that the use of the injunction in such cases—however important—is so essential to the right of acquiring, possessing and enjoying property that its restriction or elimination amounts to a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment." 257 U. S. at 349.

[174] As this case was submitted on complaint and demurrer, Chief Justice Taft

> "The necessary effect of these provisions and of Paragraph 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy which was not a dispute between employer and former employees."[177]

But the plaintiffs had open to them the same protection that was available to all other persons similarly circumstanced. There was equality as between these plaintiffs and all potential plaintiffs. There was inequality only between these plaintiffs in a suit

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felt free to "analyze the facts as averred and draw its [the Court's] own inferences as to their ultimate effect. . . ." *Ibid.* 325.

[175] *Ibid.* 328. For early views of Chief Justice Taft, see his opinion as judge of the Superior Court of Cincinnati in Moores *v.* Bricklayers Union, (1890) 23 WEEKLY L. BULL. 48.

[176] *Ibid.* 330 *et seq.* As to the relationship between the "due process" clause and the "equal protection" clause, see Taft, C. J., *ibid.* 331-33. He says, in part: "It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . It [the equal protection clause] sought an equality of treatment of all persons, even though all enjoyed the protection of due process." Of course, as the equal protection clause appears only in the Fourteenth Amendment and not in the Fifth, it does not apply to Congressional legislation.

[177] *Ibid.* 331.

The views which, through the decision in Truax *v.* Corrigan, became authoritative interpretations of the Constitution were foreshadowed by the Chief Justice before he came to the Supreme Court in his inaugural address on March 4, 1909. 16 MESSAGES AND PAPERS OF THE PRESIDENTS (1917) 7368, 7378, and later in an address before the Cincinnati Law School on May 23, 1914 (1916) 5 KY. L. J. 3, 22-23.

against their former employees and the same plaintiffs against persons not formerly in their employ. The employers were found to be without equal protection because they had fewer remedies against one class of tort feasors than against other classes. In other words, an employer was unequally protected as against himself. This was reasoning which four Justices could not accept.

The notable dissenting opinion of Mr. Justice Pitney rescued the equal protection clause from an exercise in logomachy. He allowed full scope for the practical differentiation demanded of law-making in industrialized society and did not ask legislatures to move in a realm of abstract geometry:

> "Cases arising under this clause of the Fourteenth Amendment, pre-eminently, call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the Federal Constitution he must bring himself within the class affected by the alleged unconstitutional feature. . . .
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> "A disregard of the rule in the present case has resulted, as it seems to me, in treating as a discrimination what, so far as plaintiffs are concerned, is no more than a failure to include in the statute a case which in consistency ought, it is said, to have been covered—an omission immaterial to plaintiffs. This is to transform the provision of the Fourteenth Amendment from a guaranty of the 'protection of equal laws' into an insistence upon laws complete, perfect, symmetrical.
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> "The guaranty of 'equal protection' entitled plaintiffs to treatment not less favorable than that given to others similarly circumstanced. This the present statute gives them. The provision does not entitle them, as against their present opponents under present circumstances, to protection as adequate as they might have against opponents of another class under like circumstances. I find no authority for the proposition that the guaranty was intended to secure equality of protection 'not only for all but against all similarly situated,' except as between persons who properly belong in the same class." [178]

The dissent of Mr. Justice Brandeis dealt more particularly with the due process argument. He marshalled a massive array of judicial and legislative experience to support the justification in reason with which the Arizona court upheld the Arizona legislation. Indeed, he demonstrated that Arizona in withholding the injunction from the conduct in question was doing no more than expressing by legislation the policy enforced by many state courts without the sanction of legislation.[179] He said:

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[178] 257 U. S. at 350-51.

> "the Supreme Court of Arizona made a choice between well-established precedents laid down on either side by some of the strongest courts in the country. Can this court say that thereby it deprived the plaintiff of his property without due process of law?" [180]

To the majority, however, here "the illegality of the means used is without doubt and fundamental" and a "law which operates to make lawful such a wrong" is beyond "the legislative power of a State." [181] The inference cannot be resisted that if a state deems interference in industrial controversies through injunctions against picketing and its concomitants unwise, such a policy must be worked out through judicial process. The same rules formulated by a legislature are, apparently, "purely arbitrary or capricious exercise" of the legislative power.

Thus the Supreme Court not only wrote decisively between the lines of federal legislation. Through its decision in *Truax* v. *Corrigan,* it made these interlineations a necessary condition to survival of all similar state measures.[182] The states had followed the example set by Congress—Kansas in 1913, Minnesota and Utah in 1917, North Dakota, Oregon, Washington and Wisconsin in 1919, Illinois in 1925, New Jersey in 1926 [183]—in measures for the greater part identical with section 20 of the Clayton Act. Even within their narrow margin of freedom in construing these statutes, state courts largely took their cue from the Supreme Court. Such statutes do not make new law, but are merely declaratory of the old; the legislation did not transmute what was theretofore unlawful into legal innocence; injunctive relief persists against the "secondary boycott" and group picketing, even against peaceful patrolling. Still in harmony with federal precedent, state interpretation of state statutes applies the immunities, such as they are, only to former employees; they do not govern where there is no strike of the plaintiff's own employees or in a dispute for an "unlawful purpose" or in a dispute detrimental to the state.[184]

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[179] *Ibid.* 354 *et seq.*

[180] *Ibid.* 371.

[181] *Ibid.* 328-30.

[182] The general counsel of the Wisconsin State Federation of Labor, testifying before the recent Senate hearings, thus spoke of the Tri-City Case: ". . . it went further than any of the decisions, and being a decision of the United States Supreme Court, had a very, very bad effect upon the courts so far as the administration of these cases was concerned, for the Tri-City case was followed by the State Courts. I can give my experience in Wisconsin . . . as a result of the Tri-City case, [the judges] rather infer that they should follow the precedent established by Judge Taft and the court have universally, in Wisconsin, . . . limited picketing to the use of one picket, no matter how large the plant, one picket to each entrance of the plant. . . . No matter how much we argue, or how much we endeavor to get them to interpret the decision in some other manner, we can not get the courts to change." Senate Hearings on S. 1482, p. 559.

[183] KAN. REV. STAT. ANN. (1923) § 60-1107; MINN. STAT. (Mason, 1927) § 4256-57; Utah Comp. Laws (1917) § 3652-53; N. Dak. Comp. Laws Ann. (Supp., 1925) § 7214a2; Ore. L. (Olson, 1920) § 6815-17; WASH. COMP. STAT. (Remington,

The powerful influence exerted by the general attitude of the Supreme Court upon state adjudications is evidenced by recent decisions in Illinois [185] and New Jersey.[186] The statutes of both states are, in substance, identical and neither was held to sanction peaceful picketing. The opinion of Chief Justice Taft in the *Tri-City Case* was the guiding light for both decisions. But

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1922) § 7612; Wis. Stat. (1927) § 133.07; Ill. Rev. Stat. (Cahill, 1927) c. 22, § 58; N. J. L., 1926, c. 207. See Chamberlain, *The Legislature and Labor Injunctions* (1925) 11 A. B. A. J. 815.

[184] Bull *v.* International Alliance, 119 Kan. 713 (1925); Crane & Co. *v.* Snowden, 112 Kan. 217 (1922); Heitkemper *v.* Central Labor Council, 99 Ore. 1 (1921); Greenfield *v.* Central Labor Council, 104 Ore. 236 (1922); Pac. Coast Coal Co. *v.* Dist. No. 10 U. M. W. A., 122 Wash. 423 (1922); Pacific Typesetting Co. *v.* I. T. U., 125 Wash. 273 (1923); A. J. Monday Co. *v.* Automobile A. & V. Workers, 171 Wis. 532 (1920). And see Schuberg *v.* Local Int'l Alliance of Stage Employees (Sup. Ct. Brit. Columbia, 1926) (1926) 8 Law and Labor 239.

The Wisconsin case cited (171 Wis. 532) held that the statute was inapplicable to a strike "purely and simply for the closed shop". Let the general counsel of the Wisconsin State Federation of Labor tell the story that followed this decision: "Well, we went back to the legislature, the labor union did, that is . . . —we simply amended that bill in Wisconsin by cutting out some of the provisions which the court held limited the application and we put in the words 'any dispute affecting labor' . . . and that is the way the matter now stands. . . . No court interpretation has been had as yet on the act as amended." Senate Hearings on S. 1482, p. 560.

[185] Ossey *v.* Retail Clerks' Union, 326 Ill. App. 405 (1927). Lower courts in Illinois had passed upon the constitutionality of the statute: see International Tailoring Co. *v.* Amalgamated Clothing Workers of America (1925) 7 Law and Labor 237; Ossey *v.* Retail Clerks' Union (1926) 8 Law and Labor 5. And see (1925) 15 Am. Lab. Leg. Rev. 233; (1928) 22 Ill. L. Rev. 888.

[186] Gevas *v.* Greek Restaurant Workers' Club, 99 N. J. Eq. 770, 782-83 (1926).

the New Jersey case found even the federal law not sufficiently stringent:

> "A single sentinel constantly parading in front of a place of employment for an extended length of time may be just as effective in striking terror to the souls of the employees bound there by their duty as was the swinging pendulum in Poe's famous story 'The Pit and the Pendulum' to victims chained in its ultimate band. In fact, silence is sometimes more striking and impressive than the loud mouthings of the mob. . . . It is admitted that back of the demonstrations is the full force and power of the American Federation of Labor." [187]

The legislation we have summarized had, as its essential impulse, the conviction that labor unions "were organized", in the language of the Chief Justice, "out of the necessities of the situation". That the concrete remedies by which this justification was to be realized encountered feelings of unfriendliness on the part of courts, is a conclusion not easy to escape. The decisions would not have been otherwise if courts had applied as a conscious guide the belief that though there may be unions they must not be strong.

LEGISLATION AFFECTING EQUITY PROCEDURE

There remain for consideration legislative prescriptions for procedure applicable to labor injunctions, and what courts have done with them. Procedure, it will be remembered, becomes significant at two stages in these litigations: in the process leading up to the issuance of an *ex parte* restraining order or temporary injunction, and in subsequent attempts to punish disobedience.

In our earlier description of the prevailing practice of granting restraining orders without notice to the opposing sides and of basing temporary injunctions upon affidavits, incidental mention was made of the legislative corrections that were proposed in New York and Massachusetts, and at Washington.[188] Bills formulating procedural guides and establishing limits to the discretion of federal judges in issuing *ex parte* restraining orders [189] were before Congress as early as 1901.[190] Thereafter such proposals were introduced in Congress session after session.[191] They did not encounter vigorous opposition. Neither, however, did they arouse the effective interest of labor and its friends. In the earlier phases of the movement for legislative relief, labor evinced little understanding of how much turns on rules of procedure.

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[187] *Ibid.*

[188] *Supra* Chapter II, pp. 66, 76-77.

[189] The federal legislative history of *ex parte* orders may be noted. The 1793 revision of the Judiciary Act of 1789 provided that no injunction shall "issue in any case without reasonable previous notice to the adverse party. . . ." 1 STAT.

We have already quoted from the message of President Taft to Congress on December 7, 1909, in which he recommended certain restrictions upon *ex parte* orders, the establishment of a time limit for them and specifications as to the form of order.[192] In that session, both the House and Senate considered such measures.[193] In the second session of the next Congress, the Sixty-second, provision embodying such proposals passed the House

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333, 335; see New York *v.* Connecticut, 4 Dall. 1 (U. S. 1799). So far as the reports disclose the facts, despite this statute, restraining orders were granted without prior notice to defendants. In 1872, the original of § 263 of the Judicial Code was enacted, authorizing the issuance of restraining orders without notice in the discretion of the court. That provision continued effective until the passage of the Clayton Act. 17 Stat. 197; Rev. Stat. § 718 (1878).

In his address accepting the nomination for President on July 28, 1908, Mr. Taft thus expressed his sympathy with the early federal practice in the case of a lawful strike: "In the case of a lawful strike, the sending of a formidable document restraining a number of defendants from doing a great many different things which the plaintiff avers they are threatening to do, often so discourages men always reluctant to go into a strike from continuing what is their lawful right. This has made the laboring man feel that an injustice is done in the issuing of a writ without notice. I conceive that in the treatment of this question it is the duty of the citizen and the legislator to view the subject from the standpoint of the man who believes himself to be unjustly treated, as well as from that of the community at large. I have suggested the remedy of returning in such cases to the original practice under the old statute of the United States and the rules in equity adopted by the Supreme Court, which did not permit the issuing of an injunction without notice. In this respect, the Republican Convention has adopted another remedy, that, without going so far, promises to be efficacious in securing proper consideration in such cases by courts, by formulating into a legislative act the best present practice." PROCEEDINGS OF THE FOURTEENTH REPUBLICAN NATIONAL CONVENTION (1908) 219.

[190] S. 4233, H. R. 8917, 56th Cong., 1st Sess. For earlier bills, see S. 1563, S. 1898, 53rd Cong., 2nd Sess.

[191] H. R. 18327, 58th Cong., 3rd Sess.; S. 2829, H. R. 9328, H. R. 17976, H. R. 18171, H. R. 18446, H. R. 18752, 59th Cong., 1st Sess.; S. 5888, H. R. 21991, 60th Cong., 1st Sess.; H. R. 26609, 60th Cong., 2nd Sess.

[192] *Supra* Chapter II, p. 65. The words of President Taft were used in support of the Clayton committee's first report of H. R. 23635, 62nd Cong., 2nd Sess., H. Rep. No. 612.

[193] S. 4481, H. R. 16026, 61st Cong., 2nd Sess.

as part of the Clayton Bill,[194] and the next Congress enacted them, with scarcely any opposition, as sections 17, 18, and 19 of the Clayton Act.[195]

Section 17 [196] permits the granting of a temporary restraining order without notice to defendants only when it is made clearly to appear under oath that the applicant will otherwise suffer irreparable injury. The order must state the hour of, and reasons for, its issuance; it expires within a fixed time after entry,[197] not to exceed ten days, though it may be extended for "good cause shown." Provision is further made for expeditious hearing of the motion for a temporary injunction, and the defendants are given the right to dissolve or modify the restraining order on two days' notice. Section 18 requires the giving of security as a condition to the granting of a restraining order or temporary injunction—a matter theretofore within the discretion of judges. Section 19 demands that a restraining order shall be specific and that it describe the acts restrained explicitly, not by reference to the bill of complaint or other document.[198] The same section limits the scope of the binding effect of the injunction by making it apply only to "the parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participating with them", who must be shown to "have received actual notice of the same."[199]

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[194] Section 263 of H. R. 23635, 48 CONG. REC. 6463 (1912); passed the House, *ibid.* 6470.

[195] See 45 CONG. REC. 343 (1910) and 48 CONG. REC. 6415 (1912).

[196] 38 STAT. 737 (1914) 28 U. S. C., § 381. In 1912, the Supreme Court promulgated new Equity Rules, and Rule 73 thereof is practically a complete forerunner of this section. It was adopted at the suggestion of the Bar Committee of the Circuit Court of Appeals for the 9th Circuit. It was subsequently held to embody principles long established in the federal courts. Cathey *v.* Norfolk & W. Ry. Co., 228 Fed. 26, (C. C. A. 4th, 1915). Rule 73 (226 U. S. 670) provides: "No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

[197] Considerable opposition revolved about this provision, the minority desiring to have the order date from the time of service rather than the time of its entry. We quote from H. Rep. 612, pt. 2 (the minority report) 62nd Cong., 2nd Sess. (p. 4): "We can conceive of no more certain method of depriving a suitor of essential equitable protection."

In the course of the debate upon these clauses, a member of the House denied the existence of any judicial abuse calling for correction. John W. Davis replied that reported cases

> "show at least five glaring abuses which have crept into the administration of this remedy. I name them:
> The issuance of injunctions without notice.
> The issuance of injunctions without bond.
> The issuance of injunctions without detail.
> The issuance of injunctions without parties.
> And in trade disputes particularly, the issuance
> of injunctions against certain well-established and indispensable rights."[200]

Sections 17, 18, and 19 of the Clayton Act were intended to correct the first four abuses enumerated by Mr. Davis. They have now been "the law of the land" for fourteen years. What have they accomplished? More restraining orders without notice have been granted by federal courts within that period of time than in any prior period of like duration.[201] Since 1914, we find among reported cases alone more than fifteen such instances.[202] And in most of them the orders remained effective without hearing of any kind for a longer period than the normal ten days allotted by section 17.[203] The other statutory safeguards have likewise been ineffective. Disregard of the statutory requirement of setting forth the reasons for the order has been held merely improper, and not to invalidate the order or the preliminary injunction; [204] an injunction against "interfering in any respect" with the complainant's business has been held as definite a way of expressing the conduct restrained "as it is possible to make it"; [205] a stranger to an injunction suit may still be punished for contempt of the injunction.[206] And the unreported decrees issued by the federal courts within the last three years, so far as available for examination, pay little heed to the purpose of the Clayton Act that the "Defendants should never be left to guess at what they are forbidden to do." [207]

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[198] Further quoting from the above minority report: "This proposal multiplies the delays, difficulties, and inconveniences of procedure indefinitely. It requires every order to be a history, to repeat in irrelevant and cumbersome detail all the preliminary pleadings, and instead of enlightening the parties against whom it was issued . . . the procedure prescribed would increase his confusion and doubt." (pp. 5-6).

[199] The majority report of the Committee (*supra* note 96) said as to this (p. 4): ". . . a safeguard against what have been heretofore known as dragnet or blanket injunctions, by which large numbers may be accused, and eventually punished, for violating injunctions in cases in which they were not made parties in the legal sense and of which they had only constructive notice, equivalent in most cases to none at all." To which the minority replied (p. 5): "The majority offer in proof of the necessity of their proposal merely an implication unwarrantedly reflecting upon the judiciary and without supporting proof of any character."

[200] 48 Cong. Rec. 6436 (1912).

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[201] Generally as to restraining orders without notice, see DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) § 173; Lane, *Working under Federal Equity Rules* (1915) 29 HARV. L. REV. 55.

[202] Restraining orders have been granted without notice in the following labor cases, among others, since 1912 (the time of the promulgation of Federal Equity Rule 73); Aluminum Castings Co. *v.* Local No. 84 I. M. U., 197 Fed. 221 (W. D. N. Y., 1912); Puget Sound Traction, Light & Power Co. *v.* Lawrey, 202 Fed. 263 (W. D. Wash., 1913); Sona *v.* Aluminum Castings Co., 214 Fed. 936 (C. C. A. 6th, 1914); Oates *v.* United States, 223 Fed. 1013 (C. C. A. 4th, 1915); Alaska S. S. Co. *v.* Int'l Longshoremen's Ass'n, 236 Fed. 964 (W. D. Wash., 1916); Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1916); Stephens *v.* Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917); Dail-Overland Co. *v.* Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1919; Herkert & Meisel T. Co. *v.* United Leatherworkers' I. U., 268 Fed. 662 (E. D. Mo., 1920); Forrest *v.* United States, 277 Fed. 873 (C. C. A. 9th, 1922); Local No. 7 of Bricklayers' Union *v.* Bowen, 278 Fed. 271 (S. D. Tex., 1922); United States *v.* Railway Employees' Dept. A. F. L., 283 Fed. 479 (N. D. Ill., 1922); Portland Terminal Co. *v.* Foss, 283 Fed. 204 (D. Maine, 1922); New York, N. H. & H. R. Co. *v.* Railway Employees' Dept., 288 Fed. 588 (D. Conn., 1923); Great Northern Ry. Co. *v.* Brosseau, 286 Fed. 414 (D. N. Dak., 1923); Staudte & Rueckoldt Mfg. Co. *v.* Carpenters' District Council, 12 F. (2d) 867 (C. C. A. 8th, 1926); Columbus Heating & Ventilating Co. *v.* Pittsburgh Bldg. T. C., 17 F. (2d) 806 (W. D. Pa., 1927).

[203] See Table of Federal Cases, Appendix I.

[204] See Lawrence *v.* St. L.-S. F. Ry., 274 U. S. 588 (1927). *Cf.* insistence on strict compliance with procedural requirements imposed upon administrative agencies, such as Public Service Commissions, in Wichita R. R. *v.* Pub. Util. Comm., 260 U. S. 48 (1922).

[205] Stephens *v.* Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917). But *cf.* King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257, 261 (C. C. A. 6th, 1920); Great Northern Ry. Co. *v.* Local G. F. L. of I. A. of M., 283 Fed. 557 (D. Mont., 1922).

[206] McCauley *v.* First Trust & Savings Bank, 276 Fed. 117 (C. C. A. 7th, 1921);

Several states have enacted some or all of the procedural features found in the Clayton Act. Kansas, Minnesota, North Dakota, Oregon, Utah and Wisconsin require that the complainant must describe the plaintiff's property with particularity and must carry the oath of the applicant or his agent.[208] The Kansas statute leaves to the court's discretion whether a hearing of both sides should precede a restraining order and whether security should be required of the plaintiff. Wisconsin makes the strictest requirement for the elimination of the *ex parte* evil by providing that

> "No such restraining order or injunction shall be granted except by the circuit court . . . and then only upon such reasonable notice of application therefor as a presiding judge of such court may direct by order to show cause, but in no case less than 48 hours. . . ." [209]

While the Massachusetts statute [210] is not nearly so sweeping in terms, the practice of its courts has substantially eliminated the issuance of restraining orders before a hearing.[211] In New

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United States *v.* Taliaferro, 290 Fed. 214 (W. D. Va., 1922); Day *v.* United States, 19 F. (2d) 21 (C. C. A. 7th, 1927).

[207] From Report of Clayton Committee, H. Rep. 612, 62nd Cong., 2nd Sess., p. 4.

[208] See references *supra* note 183.

[209] Wis. Stat. (1927) § 133.07 (2). For a discussion by a Wisconsin lawyer of the operation of this statute in actual practice, see Senate Hearings on S. 1482, p. 562.

[210] Mass. Gen. L. (1921) c. 214, § 9. A bill (House—No. 562) introduced in the 1929 session of the Massachusetts legislature, proposed to amend this provision by adding the following new sentence: "No preliminary injunction or temporary restraining order shall be granted in industrial disputes between employers and employees, but the court shall proceed to hear evidence on such matters and determine requests for injunctive relief in such cases as expeditiously as the ends of justice may require."

[211] *Supra* Chapter II, p. 66. Governor Allen, in his first message to the Massachusetts legislature, in January 1929, made the following recommendations concerning procedure affecting the labor injunction: "The furtherance of amicable relations between capital and labor is one of the first concerns of government, particularly in a State so predominantly industrialized as is this Commonwealth. Considerations of justice as well as those of economic welfare admonish us to remove real grievances and to avoid reasonable grounds for believing that there

York, on the other hand, the practice of issuing *ex parte* orders is prevalent, but attempts at legislative restriction have signally failed.[212]

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are grievances. The use of the injunction in trade disputes has for a number of years been a source of widespread irritation to labor throughout the country, and both Congress and the States have had to take measures against abuses. Fortunately, in this Commonwealth the practices of our courts have avoided many misuses of the injunction. Thus our courts, upon their own initiative, have generallly refrained from issuing injunctions upon an *ex parte* hearing and without adequate investigation of the facts. On this and other phases pertaining to the issuance of labor injunctions, it would appear to be the part of wisdom to formulate the usual practices of judicial procedure into positive law in order that they may be defined as the accepted standards applicable to all cases, precluding departure therefrom in individual cases. I recommend the passage of legislation which will provide that no injunctive relief shall be given in labor disputes unless both parties have had an opportunity to be heard on the facts on which the petition for the injunction is based." Mass. Sen. Doc. No. 1 (1929).

[212] Assembly Bill 113; Assembly Bill 949; S. Bill 213 (1928)—providing "No restraining order or injunction by either party to an industrial dispute shall be made by any court of this state otherwise than upon notice and after hearing. . . ." Governor Roosevelt's message to the legislature in 1929 repeated the recommendation in this language: "The prohibiting of the granting of temporary injunctions in individual disputes without notice of hearing; and provision for trial before a jury of any alleged violations of injunctions." *N. Y. Times,* Jan. 3, 1929, p. 18. In the 1929 session, a bill was introduced requiring three days' notice as a prerequisite to the issuance of a restraining order in an industrial dispute. (Assembly Bill 51.)

The exacerbated feelings of labor are revealed in the following exaggerated statement by the counsel for the State Federation of Labor, as reported in the *N. Y. Times,* Feb. 29, 1928, p. 2: "Ninety-nine percent of the injunctions signed on papers from one party and without a hearing are vacated or modified a few days later after a hearing, but the harm then has been done. The belief is growing that the courts are being used in the interests of the employers. It is creating a communistic spirit."

Equally revealing is the statement of objections to these bills filed by a Committee of the Bar Association of the City of New York: "If the advocates of this bill intended that an illegal act should not be restrained, the bill deserves no consideration. If the bill contemplates only rightful acts it is reiterative of the present law and becomes mere surplusage." Association of the Bar of the City of New York, Committee on Amendment of the Law, Bulletin No. 5 (1928), p. 153; see also *N. Y. Times,* March 7, 1928, p. 7. Such a view is indifferent to experience in disregarding the aim of the bill to withhold equitable relief only until it could be determined with some reasonable accuracy that illegal acts were really being committed. The Committee said further: "The danger is that when damage is imminent it will be accomplished before a hearing can be had." This overlooks the fact that the grant of a labor injunction before the facts are known may lead to the same danger of irreparable damage to the defendants. The author of this report had evidently forgotten the provision under the early judiciary act which forbade issuance of any injunction "without reason-

Nowhere has legislative inroad been made upon the procedure of basing injunctions upon affidavits by enacting as a prerequisite to their issuance or denial the more reliable method of hearings in open court.[213] In New York, Governor Smith twice recommended "that before such injunctions are issued a preliminary hearing be held to establish the facts."[214] In the 1928 session of the New York legislature, two bills were presented calling for a jury trial on the facts.[215] The bills never emerged from committee. Without legislation, a few courts have found themselves with ample resources to assure a reliable procedure in these cases. It is a rule in some of the federal districts that the judge may call witnesses,[216] and in several cases judges have done so.[217]

The power exercised by judges in proceedings for contempt of court yields an important chapter in the political history both of England[218] and of the United States.[219] The grievances aroused by summary prosecutions for contempt and their legislative appeasement long antedate labor injunctions.[220] But the incidence of hardship has, in our days, fallen heaviest upon labor,

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able previous notice to the adverse party." I STAT. 335. It will be recalled that Mr. Taft in 1908 suggested the return to this "original practice." See *supra* note 189.

[213] It is worth noting that in patent litigation, questions of fact may within the court's discretion be tried by a jury of from five to twelve persons. 28 U. S. C., § 772. This statute was enacted in 1875, 18 STAT. 316.

[214] *Supra* Chapter II, p. 77. Also the Governor's message to the legislature in 1928, 37 State Dept. Rep. 447, 553.

[215] Assembly Bills 113, 399. For disapproving comment, see Association of the Bar of the City of New York, The Committee on the Amendment of the Law (1928), Bulletin No. 5, at 155.

[216] 3 STREET, FEDERAL EQUITY PRACTICE (1909) § 2322, n. 81. See New York, N. H. & H. R. Co. *v.* Railway Employees' Dept., 288 Fed. 588 (D. Conn., 1923).

[217] See Tri-City Cent. T. Council *v.* American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1916); Alaska S. S. Co. *v.* International Longshoremen's Ass'n, 236 Fed. 964, 966 (W. D. Wash., 1916); King *v.* Weiss & Lesh Mfg. Co., 266 Fed. 257 (C. C. A. 6th, 1920); Kroger Grocery & B. Co. *v.* Retail Clerks' Ass'n, 250 Fed. 890 (E. D. Mo., 1918); Montgomery *v.* Pacific Electric Ry. Co., 258 Fed. 382 (C. C. A. 9th, 1919).

[218] See FOX, THE HISTORY OF CONTEMPT OF COURT (1927).

[219] Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924) 37 HARV. L. REV. 1010; Nelles, *Contempt by Publication in the United States since the Federal Contempts Statute* (1928) 28 COL. L. REV. 401, *ibid.* 525.

[220] Frankfurter and Landis, *supra* note 219 (1924) 37 HARV. L. REV. 1010, 1026 *et seq.*, 1049-50.

because of the widespread threat of summary punishment conveyed by every labor injunction. Such is its essential meaning, if not indeed its purpose. The heart of the problem is the power, for all practical purposes, of a single judge to issue orders, to interpret them, to declare disobedience and to sentence.

Doubtless as a reflex of the *Debs Case*,[221] a bill passed the Senate, as early as 1896, granting trial by jury in cases of "indirect contempt"—obstructions, that is, to a court's authority not within the presence of the judge.[222] The measure was founded on modern conceptions of political liberty. Senator Bacon of Georgia put the matter bluntly:

> "I think the lodgment of the power in any one man to determine whether personal liberty shall be taken is something entirely inconsistent with the genius of this age and with the spirit of our institutions. . . . he is judge and jury and prosecutor in the case in which he has this personal feeling." [223]

But this bill did not come out of the House Judiciary Committee.[224] At each succeeding Congress [225] Representative Bartlet of Georgia introduced a similar bill until in the Sixty-second Congress, the measure was favorably reported and passed the House.[226] Finally, in the Sixty-third Congress the agitation culminated in law.[227]

Detailed regulations for contempt proceedings became part of the Clayton Act. The most significant change was based upon the report made by the House Judiciary Committee to the previous Congress:

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[221] 158 U. S. 564 (1895).

[222] S. 2984, 54th Cong., 1st Sess. See 51 CONG. REC. 14370 (1914) for a summary of the history and debates upon that measure.

[223] 28 CONG. REC. 6378 (1896).

[224] 28 CONG. REC. 6443 (1896).

[225] See 51 CONG. REC. 9664 (1914) for this history. See the Democratic platform of 1908: "Experience has proved the necessity of a modification of the present law relating to injunctions, and we reiterate the pledge of our national platforms of 1896 and 1904 in favor of the measure which passed the Senate in 1896 [which was the Hill bill], but which a Republican Congress has ever since refused to enact, relating to contempts in Federal courts and providing for trial by jury in case of indirect contempt." PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1908) 168.

[226] H. R. 22591, 62nd Cong., 2nd Sess.

[227] §§ 21 and 22 of the Clayton Act. 38 STAT. 738 (1914), 28 U. S. C. §§ 386, 387 (1926).

> "That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal Courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt have really convicted persons of substantive crimes for which, if indicted, they would have had a constitutional right to be tried by jury." [228]

Summary trial by a single judge gave way to trial by jury, but only in a narrow class of cases and under strictly defined conditions. Amelioration in contempt procedure, introduced by the Clayton Act, applies only when a contempt also constitutes a criminal offence under any statute of the United States or under the laws of the state in which the alleged contempt was committed. In such cases there must be presented a formal charge giving reasonable grounds for belief that a contempt has been committed; the defendant must be given an opportunity to purge himself of the contempt; he is not to be arrested unless he refuses to answer; provision is made for reasonable bail pending the disposition of the charge; when demanded by the accused, trial must [229] be by jury.[230] But even in this limited class of cases, the right to jury trial does not apply when the contempt is in the presence of the court or so near as to obstruct the administration of justice, or when the contempt is violation of an injunction granted on behalf of the United States. Limits are also set to the court's discretion in imposing punishment upon a verdict of guilty: imprisonment for not more than six months, and a fine of not more than $1,000.[231]

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[228] H. Rep. No. 613, 62nd Cong., 2nd Sess., p. 6.

[229] Such "trial may be by the court, or, upon the demand of the accused, by a jury . . . " was held to be mandatory and not a permissive provision within the power of judges to withhold. Michaelson *v.* United States, 266 U. S. 42, 64 (1924). *Cf.* Supervisors *v.* United States, 4 Wall. 435, 446-47 (U. S., 1866). The point was argued in the Congressional debates. 51 CONG. REC. 16284 (1914).

[230] The minority report offered a substitute bill (H. R. 21722, 62nd Cong., 2nd Sess.) which, in lieu of a right to jury trial, gave the accused the right to have a judge, other than the one who issued the injunction, designated to try and determine the charge of contempt.

[231] The sections of the Clayton Act dealing with contempt appear as sections 386, 387, 388 and 389 in 28 U. S. C. Section 25 of the Act (28 U. S. C. § 390) provides: "No proceeding for contempt shall be instituted against a person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts."

The requirement of jury trial is, of course, the heart of these reforms and the feature against which, according to the Clayton Committee, "the most strenuous argument has been directed." [232] It was said to "cast suspicion and reflection on every judge",[233] to frustrate enforcement of injunctions in labor disputes by "sending the accused to the friends of the accused for trial." [234] To which answer was made by Senator Walsh of Montana, the spokesman of the view that prevailed:

> "Test the plan by what may be considered likely to be its operation in connection with the very class of cases that give rise to the prominence it has attained in present day thought. An injunction has issued in an industrial dispute. It is charged that it has been violated. If the judge himself assumes to determine whether it has been or has not been, he can scarcely hope to make a decision that will not subject him to the charge, if he finds the prisoner guilty, of subserviency to the capitalistic interests or hostility to organized labor, or if he shall acquit, to pusillanimity or the ambition of the demagogue. In either case his court suffers in the estimation of no inconsiderable body of citizens. How much wiser it would be to call in a jury to resolve the simple question of fact as to whether the defendant did or did not violate the injunction. What good reason is there for believing that a jury will be likely to disregard their oaths, turn a deaf ear to the plain admonitions of duty, and acquit a defendant flagrantly guilty? . . . Their verdict would silence caviling and strengthen in the minds of the people the conviction that the courts are indeed the dispensers of justice and not engines of oppression." [235]

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[232] H. Rep. No. 613, 62nd Cong., 2nd Sess. to accompany H. R. 22591, p. 6.

[233] See 51 Cong. Rec. 9670 (1914).

[234] Mr. Walker, testifying concerning contempt bill in House Hearings (*supra* note 90) said: "Congress would be sending the accused to the friends of the accused for trial and the friends of the accused would acquit the accused just as the ecclesiastical courts always acquitted a clergyman when accused of crime. The result would be that the injunctions issued by the Federal judge in labor disputes never could be enforced." (p. 145).

G. F. Monaghan, attorney for National Founders' Association, testifying against a bill requiring jury trial for contempt cases (H. R. 13578, 62nd Cong., 2nd Sess.), House Hearings (*supra* note 90): "If such a condition were imposed it would be tantamount to a denial to the court of the right to issue an injunction in any instance. . . . It must be understood that a violation of the court's order is to be answered at once and by a court not so likely to be swayed by considerations of sentiment or interest as is usually the case with juries." (p. 175).

[235] 51 Cong. Rec. 14369 (1914); see also the powerful argument of John W. Davis of West Virginia, 48 Cong. Rec., Appendix 313 (1912).

Another decade had to pass before what Congress did was given meaning and validity by the courts. Resort to jury trials for contempt was a marked innovation in this country.[236] Naturally enough, the courts rigorously applied the restrictions which Congress had itself expressed.[237] But however restricted, the right to a trial by jury upon charge of contempt was a gift which Congress could not bestow. Such was the constitutional challenge against these provisions, and it prevailed with two lower federal courts.[238] This, in brief, was the argument: the power to issue decrees implies the power to vindicate the court's authority upon disobedience, by punishment for contempt if necessary; this is an "inherent power" of the federal courts, which may not be taken away or modified by Congressional changes of procedure. In so ruling, the courts deemed themselves loyal to a cardinal dogma of American constitutional law—the doctrine of the separation of powers. Judge Baker, a very able judge who spoke for the Circuit Court of Appeals for the Seventh Circuit, resolved by a metaphor the validity of a long-matured statute:

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[236] As to the place of the jury in the vindication of law and in fostering confidence in its administration, see Frankfurter and Landis, *supra* note 219 (1924) 37 Harv. L. Rev. 1010, 1054, n. 160. Reference is therein made, *inter alia,* to these judgments upon the jury system: Hamilton—"the more the operation of the institution [of trial by jury] has fallen under my observation, the more reason I have discovered for holding it in high estimation." Mr. Justice Story—"The trial by jury is justly dear to the American people." Chief Justice von Moschzisker—"I have taken part in one capacity or another, in the trial or review of thousands of cases, and this experience has given me faith in the jury system . . . particularly where inferences must be drawn . . . the advantage in deciding questions of fact lies on the side of the . . . jury." Lord Justice Bankes—"The standard of much that is valuable in the life of the community has been set by juries in civil cases. They have proved themselves in the past to be a great safeguard against many forms of wrongs and oppression. They are essentially a good tribunal to decide cases in which there is hard swearing on either side, or a direct conflict of evidence on matters of fact. . . ."

[237] Couts *v.* United States, 249 Fed. 595 (C. C. A. 8th, 1918). Also see Patton *v.* United States, 288 Fed. 812, 815 (C. C. A. 4th, 1923); Taliaferro *v.* United States, 290 Fed. 906 (C. C. A. 4th, 1923); Cole *v.* United States, 298 Fed. 86 (C. C. A. 8th, 1924). It has been suggested in one case that contempt of a federal injunction is itself a crime against the United States. Taylor *v.* United States, 2 F. (2d) 444 (C. C. A. 7th, 1924); Armstrong *v.* United States, 18 F. (2d) 371 (C. C. A. 7th, 1927), *certiorari* denied 275 U. S. 534 (1927); Forrest *v.* United States, 277 Fed. 873 (C. C. A. 9th, 1922), *certiorari* denied 258 U. S. 629 (1922). It was held that the jury trial provision is applicable only when the relation of employer and employee exists, and that the relation does not exist in the case of an illegal strike. Michaelson *v.* United States, 291 Fed. 940 (C. C. A. 7th, 1923), *rev'd* 266 U. S. 42 (1924); criticized in (1924) 37 Harv. L. Rev. 486. For a similar result, see Sandefur *v.* Canoe Creek Coal Co., 293 Fed. 379 (C. C. A. 6th, 1923), *aff'd* 266 U. S. 42, 70 (1924). In Canoe Creek Coal Co. *v.* Christinson, 281 Fed. 559 (W. D. Ky., 1922), it was held that only contempts based on the anti-trust laws were within the purview of the jury trial sections and consequently, contemnors of a federal injunction where federal jurisdiction was based on other federal statutes or on diversity of citizenship, could not claim a jury trial. This was quickly reversed, 293 Fed. 379 (C. C. A. 6th, 1923). So, also, a case where the plaintiff was a receiver, the contempt proceedings were held not within the purview of the section. McGibbony *v.* Lancaster, 286 Fed. 129 (C. C. A. 5th, 1923). *See* (1924) 37 Harv. L. Rev. 486, *The Clayton Act Further "Construed"*.

> "Viewing the inferior courts, and also the Supreme Court as an appellate tribunal, we see that Congress, the agency to exercise the legislative power of the United States, can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but, the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution." [239]

Happily, the Supreme Court of the United States discarded this empty dialectic and put the statute in the context of reality and experience.[240] The Court concluded that "the statute now under review," granting the privilege of "a trial by jury upon demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime," did not "invade the powers of the courts as intended by the Constitution or violate that instrument in any other way.[241] But state courts, when passing upon similar state legislation, found the doctrine of the separation of powers more inflexible than it had revealed itself to the Supreme Court. As to the mode of proceeding for criminal contempt, what has been must remain. Summary practice in contempt proceedings which had been justified on historic grounds now known to be spurious,[242] was deemed by these courts beyond legislative reach.

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[238] *In re* Atchison, 284 Fed. 604 (S. D. Fla., 1922) and Michaelson *v.* United States, 291 Fed. 940 (C. C. A. 7th, 1923). These decisions are criticized in (1923) 32 YALE L. J. 843; (1923) 36 HARV. L. REV. 1012, and in Frankfurter and Landis, *supra* note 219 (1924) 37 HARV. L. REV. 1919, especially n. 136.

[239] Michaelson *v.* United States, 291 Fed. 940, 946 (C. C. A. 7th, 1923).

[240] United States *v.* Michaelson, 266 U. S. 42 (1924).

[241] *Ibid.* 66-67.

[242] The practice of summary punishment for contempt and the theory on which

These state decisions indicate the important time element in constitutional adjudications. They came in the earlier stages of the movement for this reform and, unfortunately, before the Supreme Court of the United States gave the lead to a more statesman-like perception that the doctrine of separation of powers is a political maxim[243] and not a technical, narrow legal rule.[244] Failure to appreciate this led to early nullifications, by the courts of Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma and Virginia, of statutes providing for jury trial in contempt proceedings.[245] The Michigan Supreme Court found itself in the grip of one of those factitious arguments, which so often beguile judges to forget that the complexities of life cannot be confined within a dialectic dilemma:

> "There is no middle ground; either the courts have the absolute control under the Constitution in contempt proceedings or they have only such as the legislature may see fit to confer."[246]

More recently, the Massachusetts Supreme Judicial Court also held unconstitutional[247] a requirement for trial by jury "on the issue of fact only, as to whether he [the accused] committed the acts alleged to constitute the said violation."[248] The Court felt itself bound by the following earlier dictum of Chief Justice Gray:

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it is based, rest on the undelivered judgment of Mr. Justice Wilmot in The King *v.* Almon (1765), printed by his son in WILMOT'S NOTES (1802) 243. See FOX, THE HISTORY OF CONTEMPT OF COURT (1927) 5 *et seq.;* Frankfurter and Landis, *supra* note 219 (1924) 37 HARV. L. REV. 1010, 1042 *et seq.*

[243] See comments by Madison in No. 47 of THE FEDERALIST (Lodge ed.) 299; see, also, MAINE, POPULAR GOVERNMENT (1886) 219.

[244] "The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible proximation, as that of the separation of powers." Cardozo, Ch. J. in Matter of Richardson, 247 N. Y. 401, 410 (1928).

[245] Nichols *v.* Judge of the Superior Court, 130 Mich. 187 (1902); Watson *v.* Williams, 36 Miss. 331 (1858); State *v.* Shepard, 177 Mo. 205 (1903); *Ex Parte* McCowen, 139 N. C. 139 (1905); Hale *v.* The State, 55 Ohio St. 210 (1896); Smith *v.* Speed, 11 Okla. 95 (1901); Carter's Case, 96 Va. 791 (1899); Burdett's Case, 103 Va. 838 (1904).

[246] Nichols *v.* Judge of the Superior Court, 130 Mich. 192 (1902).

[247] Walton Lunch Co. *v.* Kearney, 236 Mass. 310 (1920).

[248] Mass. Acts, 1911, c. 339, § 1. In the Massachusetts legislature for 1929, a bill (House—No. 315) was introduced providing for trial by jury whenever the violation of an injunction involves "an act which is a crime *per se.*"

> "The summary power to convict and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other Superior Courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." [249]

The United States Supreme Court has shown that in law also there is such a thing as adaptation of means to ends; that we need not choose between arbitrary limitation upon the power of courts to vindicate their authority and arbitrary restriction upon the forms of such vindication. In order to mitigate abuses of judicial power without attenuating its essential authority, new forms may be devised or old forms revived. Trial by jury in contempt proceedings is an innovation in modern practice, but it is a return to what is old in the history of English law.[250]

Since the Clayton Act, provisions for jury trial have been adopted in New Jersey, Utah and Wisconsin.[251] Such bills were before the New York legislature in 1928 and 1929.[252] They failed of passage. Lawyers predominate in legislatures, and their views on this subject largely reflect the sentiment expressed in the adverse report made by a committee of the Association of the Bar of the City of New York:

> "The court is practically stripped of its power to enforce its mandate. A jury is required to pass upon the question, a cumbersome and expensive method. The wish of one juror would frustrate the proceeding. Court mandates would fall into disrepute and become innocuous." [253]

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[249] Cartright's Case, 114 Mass. 230, 238 (1873).

[250] It cannot be too often recalled that "Novelty is not a constitutional objection. . . ." Arizona Employers' Liability Cases, 250 U. S. 400, 419 (1919). But jury trial for contempt out of court has an ancient English pedigree. F. Solly-Flood, Q. C., *The Story of Prince Henry of Monmouth and Chief Justice Gascoign* (1885) 3 Trans. Royal Hist. Soc. (N. S.) 47, 147. See Fox, The History of Contempt of Court (1927) Appendix 227 *et seq.;* Frankfurter and Landis, *supra* note 219 (1924) 37 Harv. L. Rev. 1010, 1042 *et seq.*

[251] N. J. L., 1925, c. 169 (leaving trial by jury for contempt of any order relating "to a labor dispute" to "the discretion of the vice chancellor"); Utah Comp. Laws (1917) § 3655; Wis. Stat. (1927) § 133.07(4) (the constitutionality of this statute now awaits decision before the Supreme Court of Wisconsin in Adler & Sons Co. *v.* Maglio).

[252] Assembly Bills Nos. 113, 949 (1928) and No. 51 (1929).

[253] Association of the Bar of the City of New York, The Committee on the Amendment of the Law (1928) Bulletin No. 5, p. 154.

Such Cassandra wails come readily to lawyers' lips.[254] If these forebodings were nourished by reason rather than by fear of change, surely there would be some proof that the federal courts have suffered evil consequences through the introduction of jury trial in contempt cases by the Clayton Act. Such ill effects, if any there were, would have found some expression in responsible professional opinion or through the Conference of Senior Circuit Judges[255] now serving as the articulate voice of the needs of the lower federal courts.

This concludes a resumé of the main currents of legislation affecting labor injunctions. What are we to say of its total meaning? Surely that the position of labor before the law has been altered, if at all, imperceptibly. Common law doctrines of conspiracy and restraint of trade still hold sway; activities widely cherished as indispensable assertions of trade union life continue to be outlawed. Statutes designed to contract equity jurisdiction have been construed merely as endorsements of the jurisdiction theretofore exercised. Even the procedural incidents of the equity process which make it so dangerous a device in labor controversies have not been systematically adjusted to modern needs; safeguards are all too much dependent on the wisdom and rigorous fair dealing of occasional judges. The one notable change, so far as the federal courts and a few states are concerned, is the protection of jury trial in contempt proceedings that involve accusations of crime.

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[254] The psychologic factors which condition the attitude of lawyers towards reform have been luminously analyzed by Senator Root: "Lawyers are essentially conservative. They do not take kindly to change. They are not naturally reformers. . . . The most successful lawyers are, as a rule, continually engrossed in their own cases and they have little time and little respect for the speculative and hypothetical. The lawyers who have authority as leaders of opinion are men, as a rule, who have succeeded in their profession, and men naturally tend to be satisfied with the conditions under which they are succeeding. . . . The measure which the committees of the Association have advocated have got a little farther each year, and they will ultimately arrive, but at every stage they have been blocked by opposition from lawyers. This has always come from lawyers who had succeeded and were content with things as they were; who did not want practice and proceedings changed from that with which they were familiar and who never had acquired the habit of responding to any public opinion of the Bar of the United States. If the administration of justice in the United States is to improve rather than to deteriorate, there must be such a public opinion of the Bar, and it must create standards of thought and of conduct which have their origin not in the interest of particular cases but in the broader considerations of those relations which the profession of the law bears to the administration of justice as a whole." Elihu Root, *The Layman's Criticism of the Lawyer* (1914) 39 A. B. A. REP. 386, 390-91. See also ROOT, ADDRESSES ON CITIZENSHIP AND GOVERNMENT (1916) 433. See the similar observations of Lord Westbury: "'. . . lawyers, when speaking of legislation, discourse in chains and shackles; and what are they? They are the professional prejudices, the narrow horizon within which their views are bounded, and their blunted sensibility to evils with which they have been long familiar.'" Quoted in 2 NASH, LIFE OF LORD WESTBURY, (1888) 57.

[255] See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1928) c. 6.

This record of legislative ineffectiveness is the product of more than a temper of inhospitality on the part of the judiciary. Shortcomings in legislative draftsmanship are factors, and the interests of labor, in so far as they coincide with civilized aims of society, are too often handicapped by lack of highly skilled legal advisers. But when three decades of legislative activity leave an impression largely of futility, it is fair to assume that public opinion, sufficiently strong and informed, does not care enough about these measures or that such opinion is incapable of translating its purposes into law.

CHAPTER V

CONCLUSIONS

THE main considerations which underlie both national and state legislative proposals for regulating the use of the injunction in labor controversies are the same. But the federal aspects are the more important, and our remaining discussion will therefore be confined within the sphere of federal legislation.

Issues Underlying Legislation

Expedients for regulating the use of injunctions in labor disputes have, for a generation, evoked hearings before Congressional committees and have been the subject of debate in both House and Senate. Important testimony concerning the injunctive practice has not been lacking, but the arguments drawn therefrom and the remedies proposed have heeded too little the intricacies of our legal system and the psychologic forces that determine the judicial process. Those who have experienced the hardship of injunctions, naturally enough, have urged relief too bold and undiscriminating. Entire withdrawal of the injunction from traditional spheres or, at the least, from use in labor disputes was urged as the only sure elimination of grievances. Differentiating factors between strike litigation and other litigation were blurred. The doctrines and principles that must guide and influence not only the drafting of a measure but also its judicial construction were overlooked, or at least not formulated with precision. On the other hand, critics of reform were intransigent in opposition. Specialized treatment of a particular class of litigants or of a particular class of controversies was assailed as capricious favoritism and irrational discrimination, and, therefore, offensive to doctrinaire requirements of symmetry in law. Proof, by evidence of specific abuses, that equity rules appropriate to controversies of a different nature were too loose and unguarded when invoked in a labor dispute, was either minimized or excused as the margin of error inevitable in any administration of justice. Reliance upon the universal applicability of the formulas of equity and refusal to adjust their operation to the peculiar circumstances of industrial disputes have successfully resisted, in the main, the erosion of thirty years debate. If recent proposals in the Senate are to be judged fairly, they must be examined with a more candid regard for evidence and with a readiness to bring the processes of law into accord with the lessons of experience.

The history of the labor injunction in action puts some matters beyond question. In large part, dissatisfaction and resentment are caused, first, by the refusal of courts to recognize that breaches of the peace may be redressed through criminal prosecution and civil action for damages, and, second, by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse,* executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but "government by injunction", characterized by the consequences of a criminal prosecution without its safeguards, has been challenged.

The restraining order and the preliminary injunction invoked in labor disputes reveal the most crucial points of legal maladjustment. Temporary injunctive relief without notice, or, if upon notice, relying upon dubious affidavits, serves the important function of staying defendant's conduct regardless of the ultimate justification of such restraint. The preliminary proceedings, in other words, make the issue of final relief a practical nullity. Undoubtedly, the law is here confronted with a very perplexing situation. Where the plaintiff on the surface presents a meritorious case, he should not be exposed to the peril of irreparable damage before the court can make available to him its slower, though much more scrutinizing, processes of fact-finding. This form of relief presents no difficulty when the temporary suspension of defendant's activities results in no very great damage to him, at least no damage that cannot be adequately compensated by money, security for which is provided by plaintiff's bond.[1] In labor cases, however, complicating factors enter. The injunction cannot preserve the so-called *status quo;* the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's conundrum is which side should bear the risk of *unavoidable* irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the defendant. For this situation the ordinary mechanics of the provisional injunction proceedings are plainly inadequate. Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching. The necessity of finding the facts quickly from sources vague, embittered and partisan, colored at the start by the passionate intensities of a labor controversy, calls at best for rare judicial qualities. It becomes an impossible assignment when judges rely solely upon the complaint and the affidavits of interested or professional witnesses, untested by the safeguards of common law trials—personal appearance of witnesses, confrontation and cross-examination.

But the treacherous difficulties presented by an application for an injunction are not confined to the ascertainment of fact; the legal doctrines that must be applied are even more illusory and ambiguous. Even where the rules of law in a particular jurisdiction can be stated, as we have tried to state them, with a show of precision and a definiteness of contour, the unknowns and the variables in the equation—intent, motive, malice, justification—make its application in a given case a discipline in clarity and detachment requiring time and anxious thought. With such issues of fact and of law, demanding insight into human behavior and nicety of juristic reasoning, we now confront a single judge to whom they are usually unfamiliar, and we ask him to decide forthwith, allowing him less opportunity for consideration than would be available if the question were one concerning the negotiability of a new form of commercial paper. We ease his difficulty and his conscience by telling him that his decision is only tentative.

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[1] The Supreme Court recently applied this doctrine in an application for an interlocutory injunction to prevent the enforcement of an onerous tax, where the laws of a state afforded no remedy for the repayment of such a tax, should it be found to have been an unconstitutional imposition, "even where the payment is under both protest and compulsion." The Court thus formulated the rule for the administration of equitable principles applicable to such a situation: "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted." (Ohio Oil Co. *v.* Conway, 49 Sup. Ct. 256 (1929). Obviously, the loss to defendants through the granting of an improvident injunction in a labor case is neither "inconsiderable" nor may it be "adequately indemnified by a bond."

Emphasis upon procedural safeguards in the use of the injunction must therefore rank first. Whatever differences there may be as to the particular stages of the procedure at which changes are to be made or as to the character of the changes, there should be no reasonable basis for opposing such correctives, once the unique elements that enter into labor litigation are fully recognized.[2] The self-denying ordinances which far-sighted and courageous judges have imposed upon themselves must be made part of the conventional routine of legal procedure. On this phase of the matter, we have the recent admonitions of Judge Swan, speaking for himself and Judge Learned Hand, in affirming denial by Judge Thacher [3] of a temporary injunction:

> "Seldom can labor disputes wisely be decided upon affidavits and counter affidavits. On the present issues the law is too uncertain to be applied without full knowledge of the facts. The suit raises questions

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[2] A question like that posed by Walter G. Merritt, at the Senate Hearings on S. 1482, involves the fallacy of over-simplification, of giving variants the form of absolutes (p. 769): "If there is any safety in equity procedure of this kind, why should an appeal be indicated limiting the reform, so called, to this class of cases? If the method of procedure, in securing any injunction and its enforcement, and so forth, are matters which are wrong and should be remedied, should we have special legislation, instead of the general legislation for the good of all litigants in equity?"

[3] Aeolian Co. *v.* Fischer, 27 F. (2d) 560 (S. D. N. Y., 1928).

of importance to the public as well as to the parties, and should be awarded a final hearing promptly."[4]

But after all, procedural safeguards are not enough. Judges have to apply "the law"—the coercing will of society. As to labor law, the governing rules of conduct are essentially not legislative formulations; largely they are judge-made law. Our first chapter summarily portrays the existing legal order. There we set forth the rules by which employers and employees must be guided in their competition with each other for their respective shares in the goods of the world and in their much more subtle rivalry for power in the conduct of industry.[5] Legislatures must decide whether such rules conform to prevailing conceptions of public policy or, if these demand a change of rules, the desirable extent of such change within constitutional limits.

Spokesmen for labor bear considerable responsibility for the confusion which has characterized attempts to formulate the law governing the activities of labor. Its advocates have too often insisted that their only aim is clarification of judicial dicta, correction of misinterpretations by the judiciary, or formal pronouncement of what always has been the law. This approach, however much inspired by the tactics of reform, breeds obscurantism. It is time to repudiate diplomatic disingenuousness and to rely upon the tactics of candor. In the main, law reflects the requirements of civilized society as the judges in a particular period conceive them. When change is sought, legislatures should be frankly informed that they are asked to measure social needs differently.

Judged by authoritative utterances, contemporary society rests upon certain assumptions: that social progress depends upon economic welfare; that our economic system is founded upon the doctrine of free competition, accepting for its gains the cost of its ravages; that large aggregations of capital are not inconsistent with the doctrine of free competition, but are, indeed, inevitable and socially desirable; that the individual workers must combine in order thereby to achieve the possibility of free competition with concentrated capital. The task of law, whether expressed by judicial decision or newly formulated by statute, is to accept or reject concretely the implications of these assumptions.

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[4] Aeolian Co. *v.* Fischer, 29 F. (2d) 679, 681 (C. C. A. 2nd, 1928).

[5] Mr. Justice Holmes, in a famous opinion, went to the heart of the matter: "I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term of free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." Vegelahn *v.* Guntner, 167 Mass. 92, 107 (1896).

Recognition of the social utility and, indeed, of the necessity of trade unions implies acceptance of the economic and social pressure that can come from united action. Such acceptance does not solve all difficulties; it leaves open the most troublesome of questions—the questions of how far and when. The possible ramifications that the power of concerted action may take and the various uses to which it may be put raise bristling issues of policy, and, therefore, of law. Thus, the employees of a plant may call a strike to gain some immediate advantage such as higher wages, shorter hours, improved working conditions. Or, they may seek an end of less immediate benefit, such as the right of collective bargaining or complete unionization, in order to strengthen their resources in a future contest for the satisfaction of economic needs. Again, extension of its membership by a trade union may become a condition of retention of gains already won and a requisite of further gains in the betterment of industrial conditions. And so, a union imperilled by the fact that its employer, subject to union restrictions, may be unable to compete with non-union employers in the same or a related industry, may seek one of two ways to protect its standards: it may refuse to spend its labor upon the materials or products from such non-union plants; it may seek to unionize those plants by diverse appeals to the non-union employees or to the public. By picketing and by debate directed to non-union employees and by appeals to the world at large, it may bring new recruits within the orbit of trade unionism; it may accomplish its aim by more drastic measures, through the disciplinary devices of organized labor and through pressure upon the public not to patronize or deal with non-union shops for their products. Finally, a union may conceive the realization of its own aims, in themselves socially desirable, to be dependent upon association with workers in unrelated industries, and hence exert its powers of concerted action in their aid and, in turn, invite their help in its own struggles.[6]

By some such analysis the issues involved in labor controversies must be pierced to their true meaning and cleared of the fog of incriminating terminology. Once we recognize that the right of combination by workers is in itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power, the consequences of making the power of union effective will be seen in truer perspective. Undoubtedly, hardships and even cruelties are involved in this phase, as in other aspects, of our competitive system. Wise statesmanship here enters to determine at precisely what points the cost of competition is too great. Primarily this is the task of legislatures. Only within very narrow limits is it the function of courts to apply their own notions of policy. And it is immaterial whether this is done by judges with the frank avowal that they also are organs of policy or under the subtler guise of enforcing constitutional coercions. To count the cost of union weapons is to count the cost of free competition in industrial controversy. Without breeding other ills and, above all, without hurting the prestige of law, that cost is not to be diminished by curtailing in the name of law the most effective union tactics. It can only be diminished by bringing industry more and more within the area of collaborative enterprise.[7]

PROPOSED FEDERAL LEGISLATION

The eagerness of employers to seek injunctions in the federal courts and the diverse channels through which the federal courts enter these controversies, have given the federal labor injunction its political significance. Anything which may seriously impair the prestige of federal courts touches more than the effective administration of law. To a peculiar degree these courts serve a vital political function. The federal courts have had an historic share in moulding the loosely knit states into a nation, and they continue to be an essential means for achieving the adjustments upon which the life of the Union rests. The harmonious relation between the states and the central government is in no small measure dependent upon the part played by the federal courts. That the exercise of their powers in labor controversies has harmfully implicated the federal courts cannot be gainsaid. The reason for disaffection has been illuminatingly analyzed by Senator George Wharton Pepper:

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[6] The legal status of all of these possibilities is reviewed in Chapter I.

[7] President Hoover's admonition in his Inaugural is here applicable: "Self-government does not and should not imply the use of political agencies alone. Progress is born of cooperation in the community—not from governmental restraints."

> "Naturally enough, during the past few decades, there have been bitter protests from the ranks of labor. To the striker it seems like tyranny to find such vast power exercised—not by a jury of one's neighbors—but by a single official who is not elected but appointed, and that for life, and whose commission comes from a distant and little understood source." [8]

If the authority wielded by the federal courts in these matters were indispensable, the discontent would be an inevitable cost of authority. But Senator Pepper speaks for powerful opinion when he asks whether the federal courts must continue, in the way in which they have done, "to take up the shock of our industrial warfare."

In 1914, the sponsors of the Clayton Act believed that they had formulated the answers to the doubts and difficulties which Senator Pepper found still more alive ten years later. That the Clayton Act has defeated the hopes which inspired it, that its judicial application has revealed needs for further legislation, is written in recent Congressional history. Following the war a new effort for legislative restrictions on the use of injunctions began, and the momentum for legislation has been steadily rising. We note a bill to make the Clayton Act exemptions effectual even in a government application for an injunction; [9] bills further regulating procedure for contempt by broadening the right of trial by jury; [10] bills confining the availability of injunctions in labor disputes and limiting the application of the anti-trust laws.[11] In the Seventieth Congress, demand for reform attains vitality. By reason of its far-reaching implications, a bill introduced by

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[8] (1924) 49 A. B. A. REP. 174, 177.

[9] H. R. 12622, 67th Cong., 2d Sess.

[10] S. 422, H. R. 570, H. R. 654, H. R. 709, H. R. 720, H. R. 2911, H. R. 3925, 68th Cong., 1st Sess.

[11] H R. 3208, 68th Cong., 1st Sess.; H. R. 3920, 69th Cong., 1st Sess.

Senator Shipstead [12] aroused the deep interest of the protagonists to the labor conflict as well as of neutrals. Senator Shipstead expressed in very few words what is probably the most sweeping measure affecting injunctions that has ever come before Congress. His bill proposed that nothing should be deemed "property" within the cognizance of a federal court of equity unless it was "tangible and transferable." [13] The idea expressed by this bill had long been sponsored by Andrew Furuseth, President of the International Seamen's Union. Furuseth is a notable figure in the international labor movement, and has dedicated his life to the welfare of his fellow seamen. He is concerned in whatever concerns labor, and has fought against the injunction unceasingly. Of a studious nature, he delved into the history of chancery, and from his conclusions as to the bases of equity jurisdiction formulated a remedy which became the Shipstead Bill. With indomitable tenacity, Mr. Furuseth has persisted in his own conception of legal history and in the espousal of a reform deemed by him the correct legal tradition.[14] There is much that is gallant in the picture of this self-taught seaman challenging with power and skill an entire learned profession. For, almost without exception, the informed opinion of lawyers, even of those most sympathetic with Mr. Furuseth's aims, regards his proposal as an attempt to throw out the baby with the bath. The Shipstead Bill condemns many well-settled and beneficent exercises of equitable jurisdiction that do not touch even remotely the interests of labor.[15]

The bill, such as it was, opened wide the door of legislative

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[12] For an earlier expression of the Senator's views, see 65 Cong. Rec. 6685 *et seq.* (1924).

[13] S. 1482. See *supra* Chapter II, p. 47. The bill in this form received little discussion on the floor of the Senate. See 69 Cong. Rec. 3449, 3909 (1928).

[14] See Mr. Furuseth's testimony before the Senate Subcommittee on the Judiciary Hearings on S. 1482, pp. 18, 23, 146, 877.

[15] For an enumeration of some thirty-two categories of litigation, other than labor disputes, from which equity jurisdiction would have been withdrawn by this bill if enacted, see Hearings on S. 1482, p. 924. The Journal of the American Bar Association said editorially concerning the original Shipstead Bill: "It does not apply alone to labor disputes, where the conflict over the use of injunctions is fiercest—but also deprives all intangible property of protection by means of injunctions. (1928) 14 A. B. A. J., 201.

"A proposal so drastic in character—so narrow in its conception of the sort of 'property' that is entitled to the full protection of the courts—so extensive in inquiry. On February 28, 1928, extensive hearings were begun before a Subcommittee of the Senate Committee on the Judiciary and were continued until March 22, 1928. In more than seven hundred pages of testimony, labor leaders and lawyers, representatives of trade unions and of employer associations, sponsored and opposed the Shipstead Bill and submitted evidence on the wider issue of abuses in the issuance of injunctions under the present law. Finding the Shipstead Bill inappropriate, but convinced that corrective legislation was essential, the Subcommittee on May 23, 1928 submitted a new bill.[16]

By the first section of the Third Article of the Constitution of the United States, the "judicial Power" is vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." By the second section of the same article the "judicial Power" is extended to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." and to all cases, "between Citizens of different States. . . ." The second section is not descriptive of the necessary ambit of authority over controversies by federal courts. It defines the limits of power which may be exercised by federal courts; only Congress can bring this judicial power into play. Congress may exhaust this constitutional authority wholly or partially, or not invoke it at all. Every inferior federal court is thus created by act of Congress and derives the jurisdiction that it exercises through grant of Congress. Such was the view of the most influential of the framers of the Constitution and, beyond peradventure, of the draftsmen of the First Judiciary

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scope and in possible consequences, cannot commend itself to the Bar as a sober and reasoned effort to improve the administration of justice."

Senator Shipstead has announced that he purposes to introduce his bill in revised form in the Seventy-first Congress. (*U. S. Daily*, March 26, 1929, p. 1, col. 4.) In support of this bill he will also submit a memorandum prepared by Mr. Furuseth entitled *Government by Law* vs. *Government by Equity*.

[16] This new bill retained the number of the Shipstead bill—S. 1482; its text is printed in 69 Cong. Rec. 10050 (1928). A discussion of this bill by Senator Blaine, a member of the Senate Subcommittee, is reprinted in 70 CONG. REC. 579 (Appendix 1928). Opposing discussion will be found in (1928) 10 LAW AND LABOR 251; (1929) 11 LAW AND LABOR 3. Andrew Furuseth opposed the new bill at the hearings. See Hearings on S. 1482, p. 877 *et seq.*

Act of 1789 which created the federal hierarchy of courts.[17] Such is the settled doctrine of the Supreme Court.[18]

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[17] See Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 297 (1888) where the Court points out that the Judiciary Act was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning." And see Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 57. Mr. Warren summarizes the debates: "This was the crucial contest in the enactment of the Judiciary Act. The broad pro-Constitution men took the position that Congress had no power to withhold from the Federal Courts which it should establish any of the judicial power granted by the Constitution. On this point, they were forced to yield; for the Congress withheld from the Federal Courts much of the jurisdiction which it might have bestowed under the Constitution. On the other hand, the narrow pro-Constitution men were anxious to give to the Federal Courts as little jurisdiction as possible and to leave to the State Courts, in the first instance, jurisdiction over most of the Federal questions, subject to Federal revision through the appellate power of the United States Supreme Court. On this point, this faction also was forced to yield. The result was a compromise." *Ibid.* at 67-68.

In Turner *v.* Bank of North America, 4 Dall. 8, 10, 11 (U. S. 1799), Ellsworth, C. J., said that the circuit courts had "cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace." And in the same case, in the course of argument, Mr. Justice Chase observed: "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress . . . congress is not bound, and it would, perhaps, be inexpedient to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant." (at 10.)

[18] See Cary *v.* Curtis, 3 How. 236, 245 (U. S., 1845) where the Court said: ". . . the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. . . . It follows, then, that the courts created by statute must look to the statute as the warrant for their authority. . . . The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law." And see Sheldon *et al.* *v.* Sill, 8 How. 441 (U. S., 1850); *Ex parte* Robinson, 19 Wall. 505 (U. S. 1873); Holmes *v.* Goldsmith, 147 U. S. 150 (1893); Myers *v.* United States, 272 U. S. 52, 128 (1926).

All arguments to the contrary have their source in Story's doctrinaire federalism that "If it was proper in the Constitution to provide for" judicial authority, "it is wholly irreconcilable with the sound policy or interests of the Government

Accordingly, the injunctive powers in labor disputes now exercised by the federal courts may be modified in one or more of several directions. Congress may withdraw the whole federal jurisdiction based on diversity of citizenship of the parties.[19] Through claims of such diversity, probably two-thirds of the labor cases now find their way into the federal courts.[20] Congress may repeal or modify federal anti-trust laws [21] or, for the immediate purpose, repeal the provision of the Clayton Act granting to private parties [22] injunctive relief against violations of the anti-trust law. But both these modes of reform would reach far beyond the domain of labor injunctions. A third method is to deal explicitly with labor disputes by defining and limiting the exercise of federal jurisdiction in such controversies. This mode of approach merely recognizes that industrial relations present distinctive problems for the wise use of judicial power. Upon this basis the Senate Committee fashioned its recommendations.

The first section [23] reveals the underlying constitutional theory

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to suffer it to slumber." 1 STORY, LIFE AND LETTERS OF JOSEPH STORY (1851) 293. Judge Bushrod Washington, was probably of the same view. See *Ex parte* Cabrera, Fed. Cas. No. 2278 (D. Pa., 1805). Story's doctrine is refuted by the whole series of judiciary acts.

[19] Such a bill was favorably reported out of the Senate Judiciary Committee on March 27, 1928. See S. 3151, reported out with Sen. Rep. No. 626, 70th Cong., 1st Sess., as amended by Senator Norris on May 8, 1928 (69th CONG. REC. 8439 *et seq.*) For a memorandum in opposition to this bill by the Committee on Jurisprudence and Law Reform of the American Bar Association, see 69 CONG. REC. 8078 *et seq.* (1928); and the address of Charles E. Hughes before the New York branch of the Federal Bar Association, reported in *U. S. Daily,* Dec. 17, 1928, p. 4. For opposition expressed editorially by the Journal of the American Bar Association, see (1928) 14 A. B. A. J. 200; and see the address of Gurney E. Newlin, President of the American Bar Association in (1929) 15 A. B. A. J. 401. *Cf.* Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499.

[20] We are indebted for these figures to a classification based upon a study of reported cases from 1891 to 1927 made by W. C. Waring, Jr., embodied in an unpublished paper, entitled *The Use of the Injunction in Labor Disputes by the Federal Courts* (Harvard Law School Library). "Diversity" cases generally are estimated to constitute one-third of the business of federal courts. See Frankfurter, *supra* note 19 at 523.

[21] Proposals for modification of the anti-trust laws have in recent years come both from representatives of industry and of labor. See, *e.g.,* Butler, *A Constructive Anti-Trust Law* (1928) 13 ACAD. OF POL. SCI. PROC. 156.

[22] 38 STAT. 730, § 18 (1914), 15 U. S. C. § 26 (1926); see Paine Lumber Co. *v.* Neal, 244 U. S. 459 (1917).

[23] It reads: "That no court of the United States, as herein defined, shall have

of the proposed act. It is an application of the doctrine that the federal courts are creations of Congress and that "the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution." [24]

Section 2 defines the views of Congress concerning industrial relations and declares them to be "the public policy of the United States":

> "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

This pronouncement recognizes the futility of freedom *of* contract in the absence of the freedom *to* contract. That a single enterprise may, and increasingly does, control the opportunity for the em-

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jurisdiction to issue any restraining order or injunction in a case involving or growing out of a labor dispute, except—

(a) When the procedure followed and the order issued by the court shall conform to the definitions of, and the limitations upon, the jurisdiction and authority of the court, contained in this Act; and

(b) When the issuance of such a restraining order or injunction shall not be contrary to the public policy declared in this Act.

In Section 9 (d), it is provided: "The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress."

[24] United States v. Union Pacific R. R. Co., 98 U. S. 569, 603 (1878). For illustrative material as to how this principle has been applied by Congress in a large body of enactments since the foundation of the union, see Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1059.

ployment of thousands, and that through coöperative tactics of these large units the practical dominance of a whole industry may be achieved—these are facts of our economic life which form the major premise of the proposed legislation.

As formula, this expression of policy is far from novel. Many courts, including the Supreme Court itself, have repeatedly given it judicial benediction. The need for legislative assertion arises, as we have seen, from the fact that in action the courts have honored this policy more in the breach than in the observance. The new legislative exordium is doubtless also susceptible of judicial evaporation. But in its setting, the section is useful rhetoric. It is intended as an explicit avowal of the considerations moving Congressional action and, therefore, controlling any loyal application of national policy by the courts.[25] For it is the primary function of the legislature to define public policy. Apart from policies implied in constitutional limitations, the courts express policy only when the legislature is silent or ambiguous.

The whole bill flows logically from its avowed public policy. By particularization, it aims to give that policy content and meaning. Thus, section 3 seeks to effectuate the rights of free association and to secure genuine representation in collective bargaining. The rapidly increasing use of the so-called "yellow dog contracts" has grown into a serious threat to the very existence of labor unions. In view of the inequitable conditions that surround the formation of such agreements and the unfair division of their obligation, to appeal to equity for their enforcement is to disregard the fundamentally ethical foundations of courts of chancery. Having regard to the motives behind such agreements and their practical consequences, section 3 withdraws from them the support of the federal courts by making them unenforceable both at law and in equity.[26]

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[25] For similar declarations of public policy in recent legislation, see Tit. 1, § 2(b) of Packers and Stockyards Act, 1921 (42 STAT. 159) 7 U. S. C. § 181 *et seq.* (1926)), as applied in Stafford *v.* Wallace, 258 U. S. 495, 510 (1922) and § 15(a), par. 5 of the Transportation Act of 1920 (41 STAT. 456, 49 U. S. C. §§ 15-20 (1926)), as construed in Dayton-Goose Creek Ry. *v.* United States, 263 U. S. 456 (1924). See also Railway Labor Act (44 STAT., pt. 2, 577, § 1 (1926), 45 U. S. C. § 151 (Supp. 1928)).

[26] "No undertaking or promise, such as is described in this section, or any other undertaking or promise contrary to the public policy declared in section

Such a provision has ample constitutional justification. The Fifth Amendment, which prohibits federal legislation from taking liberty or property without due process of law, was utilized by the Supreme Court to invalidate the section of the Erdman Act which made it a criminal offence for interstate carriers to require their employees, as a condition of continuing employment, to enter into contracts for abstention from union membership.[27] That decision is inapplicable to the proposed section 3. Formation of the agreement is not made a criminal offence and the agreement itself is not rendered a nullity, but is simply denied force in the federal courts. The contracting parties remain free to seek such court relief as may be available in the state tribunals; merely the federal courts must decline to recognize rights

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2 of this Act, shall be enforceable or shall afford any basis for the granting of legal or equitable relief by any court of the United States, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby—

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization."

It is to be noted that this section applies to employers as well as to employees. *Cf.* § 2 of the Railway Labor Act of 1926 which provides: "All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

"Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." 44 STAT., pt. 2, 577, (1926), 45 U. S. C. § 152 (1926). See *supra* Chapter III, p. 110; also note (1928) 42 HARV. L. REV. 108.

In order to avoid the possibility of removal by defendants into the federal courts of actions begun in the state courts, where state law gives a wider range of relief, removal in such cases of diverse-citizenship ought to be prohibited. We are indebted to Prof. Roger Foster of the Harvard Law School for this suggestion.

[27] Adair *v.* United States, 208 U. S. 161 (1908); see *supra* Chapter IV, p. 146.

based upon these agreements. Clearly thereby Congress is denying a litigant no constitutional right:

> "The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right *granted* by the Constitution. . . . The Constitution simply gives the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right."[28]

Judged as a model for future state legislation, an argument may be drawn from *Coppage* v. *Kansas*[29] that there is involved an infringement of the due process guaranty of the Fourteenth Amendment. But, it will be recalled that the *Coppage Case* invalidated an act that also made it a criminal offence for employers to exact such agreements from their employees. The proposed measure, were it to be enacted by states, would only make of such an agreement a nullity. The Supreme Court has sanctioned many limitations upon the abstract right to contract when thereby actual liberty to contract is promoted. The legal conception of "duress" at common law is much narrower than the range of economic coercion. But that conception of duress grew out of a very different state of society than our own, and does not limit the capacity of law to absorb the economic facts of contemporary society. The compulsions upon men's free choice in action vary from time to time, and living law must make its accommodations to shifts in compulsion. Certainly, if a legislature, having due regard to the actual practice of industrial hire and fire and specifically to the inequitable provisions of these contracts, should conclude that a wise public policy does not justify their judicial enforcement, the Supreme Court ought not to neglect the truth of such industrial facts, even if this may involve a re-examination of some assumptions in the *Coppage* opinion.

Section 4 of the proposed act deals with the substantive provisions of a decree. In part, it defines limitations upon injunctive relief which most courts have recognized, but a few have notoriously transgressed; in part, however, it withdraws equitable protection from some conduct that federal courts have consistently regarded as illegal. Generally, the section provides that in cases growing out of labor disputes, no persons participating in, or affected by, such disputes shall be enjoined from striking, or from striving for the success of strikes, by customary labor union effort, short of fraud or violence. But the immunity accorded is circumscribed: it is not immunity from legal as distinguished from equitable remedies,—hitherto unlawful conduct remains unlawful; it is applicable only to labor disputes in which the contending groups are engaged in the "same industry, trade or occupation." The surviving right to an injunction as to conduct not relieved by section 4, such as fraud and violence, and as to all conduct including that designated in section 4 where the defendants are not engaged in the "same industry, trade or occupation" as the complainant, is subject to this important qualification (section 7a):

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[28] Kline *v.* Burke Constr. Co., 260 U. S. 226, 233-34 (1922).

[29] 236 U. S. 1 (1914); see *supra* Chapter IV, p. 146.

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or arbitration."

A word may be appropriate concerning the rationale of the general scheme thus proposed, before reviewing the specific activities that, by section 4, are excepted from the reach of an injunction. It is an attempt to recognize frankly that the central problem of the law of industrial relations is to determine the purposes that justify combination of laborers by marking the outposts of the concept of "self interest." How far laborers may combine to strive for concessions that are not of immediate benefit to them but which strengthen the union organization; how far a union in one craft may use its power to achieve the unionization of nonunion plants within the same craft; how far a union of one craft may exert its power in aid of unions of another craft, and how dependent one craft must be upon the other to justify co-operative tactics—these and like issues are the crucial ones. Section 9 of the proposed bill settles all of these questions so far as application for equitable relief is concerned. Immunity from injunctions extends to all the categories that we have described, save alone as to persons who are not engaged in the same industry with the complainant.[30] What occupation, craft or trade is within, or outside of, a particular industry is necessarily left for individual decision. The obvious change intended by section 9 is to extend the area of unrestrainable conduct beyond the limits now recognized by federal decisions. The interpretation given to the Clayton Act by the *Duplex Case*,[31] to the effect that the privileges of that Act may be invoked only in a dispute between an employer and *his* employees, is thus rendered innocuous. So much for the meaning of the new proposals.

As to the merits of this extension of the permissible area of controversy, something has been said already. The economic bond that unites in interest all who earn their livelihood by any of the processes of fabrication and distribution of a single commodity, or of related commodities, or of commodities industrially dependent upon one another, is a relatively recent phenomenon in its significant proportions. Just as conditions of labor in one shop react upon conditions of labor in another shop of the same craft, so conditions of labor in the craft as a whole influence labor conditions in other but allied crafts. These are facts to be heeded if there is to be any correspondence between law and life. The meaning of these facts, Mr. Justice Brandeis has made luminously clear:

> "When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation

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[30] Section 9 achieves this by a series of definitions of the terms "cases involving or growing out of a labor dispute," "persons participating and interested in a labor dispute," and "labor dispute."

[31] 254 U. S. 443 (1921); see *supra* Chapter IV, p. 167 *et seq.*

through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. . . . But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself." [32]

Section 9 thus registers the implications of interdependence within American industry. It permits the collaboration of efforts between unions whom substantial interests make natural allies. It withholds immunity from the chancellor's decree at a point where combination aims to include unions that have no economic bond but only a sympathetic interest.[33]

Now for the content of the immunity as laid down in section 4. That section withdraws jurisdiction from the United States courts to issue injunctions against doing "singly or in concert" [34] any of the enumerated acts. To these acts we turn.

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;"

These words are a paraphrase of like language in the Clayton Act which was held to be merely declaratory of the modern common law right to strike. The difference lies in the effect of section 9, discussed above, which is to widen the category of purposes for whose attainment the strike is a privileged means. We need only remind of the federal decisions previously considered that may be deemed a justification for this clause.[35] The next subsection prohibits injunctions against

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[32] *Ibid.* at 482 (dissenting opinion).

[33] *Cf.* the line judicially drawn by the courts of New York with regard to the permissible use of the "secondary boycott," *supra* Chapter I, p. 44.

[34] This phrase, together with section 5, to wit:

> "No court of the United States shall have jurisdiction to issue a restraining order or injunction upon the ground that any of the persons participating and interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act."

is directed to curb the doctrine, continually used in labor cases, that there is something vicious and illegal in the mere element of combination regardless of the purpose and intent of the combination. It is drawn to forestall interpretation of the privileges of section 4 whereby it will not operate when exercised in furtherance of a "conspiracy". It is intended that the section 4 privilege shall be limited only by the boundaries established in section 9. Argument was made at the Senate hearings in December 1928 that in view of the "singly or in concert" phrase, section 5 was redundant and unnecessary. But it is to be recalled that section 20 of the Clayton Act also used "whether singly or in concert", which alone had little effect with the courts. See *supra* Chapter IV, p. 174, where are discussed the cases subsequent to the Clayton Act which made use of the "conspiracy" doctrine.

> "(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;"

Section 3, in conjunction with this clause and clause (i) of section 4, eliminates the possibility of enforcing "yellow dog contracts" by injunction. The redundancy of section 3 and clauses (b) and (i) of section 4 is warranted, first, because injunctions have always been the effective method of enforcing these contracts, and, secondly, because of the possibility that section 3, which removes legal as well as equitable remedies, may be deemed too sweeping by the Supreme Court.

> "(c) Paying or giving to, or withholding from, any person participating and interested in such labor disputes any strike or unemployment benefits or insurance or other moneys or things of value;"

The meaning and merits of this provision require no commentary. What has been generally recognized as law is spelled out to avoid the recurrence of unwarranted features in at least two federal decrees in recent years.[36]

> "(d) By all lawful means aiding any person participating and interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or a suit in any court of the United States or of any State;"

This is a safeguard made necessary by two recent cases in which federal courts have restrained labor unions from assisting their members in the defense or prosecution of their rights in the courts.[37]

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[35] See *supra* Chapter IV, p. 174; Chapter III, p. 104.

[36] United States *v.* Railway Employees' Dept. (injunction reprinted in Senate Hearings on S. 1482, p. 113); Red Jacket Consol. Coal Co. *v.* Lewis (injunction reprinted in Senate Hearings on S. 1482 p. 596). See *supra* Chapter III, pp. 99-105.

[37] See clause (4) of the injunction approved in Red Jacket Consol. Coal and Coke Co. *v.* Lewis, by Circuit Court of Appeals for the Fourth Circuit, 18 F.

The remaining clauses of section 4, we shall consider as a whole.

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;"

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;"

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;"

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified;"

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act."

These clauses reveal a significant departure from the Clayton Act: they describe conduct that is unrestrainable and they do so without use of the treacherous adjective "lawful".[38] Within the boundaries established by section 9 (which, as has been pointed out, makes the immunity of wider application than the Supreme Court gave to the Clayton Act) parties affected by a labor dispute may exert practically any of the present-day devices for furthering economic interest that we described in our first chapter, short of fraud and violence. Undoubtedly, these clauses modify the law as most federal courts now understand it.[39] But

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(2d) 839, 842. See also Pittsburgh Terminal Coal Corp. *v.* United Mine Workers, (injunction reprinted in Senate Hearings on S. 1482, pp. 407-09, 597). In both cases, the union was enjoined from aiding the strikers in resisting eviction from their homes which were owned by the company. See *supra* Chapter III, p. 101; *cf.* Clarkson Coal Mining Co. *v.* United Mine Workers, 23 F. (2d) 208 (S. D. Ohio, 1927); (1928) 41 HARV. L. REV. 924.

[38] For the Supreme Court's attitude toward such "uncertain and vague terms" in other situations, see Manley *v.* State of Georgia, 279 U. S. 1 (1929).

[39] For injunctive restraint, ever since the Clayton Act, of conduct specifically permitted by the proposed section 4, see *supra* Chapter III, pp. 99-105. Compare the following remarks by Judge Clark as to New Jersey practice: "Of course, in the very effectiveness of the relief lies the danger of its abuse on the part of any court. Before the justice of the demand can be determined, often, at all, and, at any rate, by the constitutional means of a jury, the defendant is facing the risk of imprisonment—again without a jury to pass on his action or non-action. It is, we think, because of the realization of such dangers that the Act of October 15, 1914, 38 STAT. 738 (28 USCA § 387, and 29 USCA § 52), was drafted to cover a class of cases (labor injunctions) where a misuse leaves a sense of

they only summarize the conventional tactics of organized labor in its effort to improve its material conditions or to make effective in industry those principles of liberty which are axiomatic in our political life.

With due regard for the power of Congress to formulate policy and with insight into the realities of industrial life, these provisions ought to weather the tests of constitutionality. They do not offend any decision of the Supreme Court. To be sure, in *Truax* v. *Corrigan*,[40] the Court by the narrowest division, found an attempted modification of equity jurisdiction by a state violative of the Fourteenth Amendment in that complainants' damage was in "effect made remediless" and that they were "denied the equal protection of the laws".[41] The first ground was rested upon a finding that the Arizona statute "withheld from the plaintiffs all remedy for the wrongs they suffered." No such interpretation is possible for the proposed bill, which explicitly applies only to the authority of United States courts "to issue any restraining order or injunction." All other remedies in federal courts and all remedies in state courts remain available. The second ground of *Truax* v. *Corrigan* is inapplicable, because the equality clause of the Fourteenth Amendment does not limit Congressional but only state legislation. It is hardly to be assumed that the application given in *Truax* v. *Corrigan* to the equal protection clause of the Fourteenth Amendment will be imposed upon the due process clause of the Fifth Amendment.

Sections 7, 7a, 7b, and 7c deal with the mechanics of *ex parte* orders and temporary injunctions, and of appeals.[42] Section 7

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injustice against the existing system in the minds of those whose good will is in my opinion essential to its continuance. It may be observed that, since this act has been on the books, the United States judges, in this district at least, have been shunned in favor of their colleagues on the state bench." United States *v.* Mayor and Council of City of Hoboken, N. J., 29 F. (2d) 932, 936-37 (D. N. J., 1928).

[40] 257 U. S. 312 (1921).

[41] See *supra* Chapter IV, p. 178. In this connection, see a note in (1929) 29 Col. L. Rev. 624.

[42] Section 6 provides: "No officer or member of any association or organization, and no association or organization participating and interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or of

withdraws jurisdiction from the federal courts to issue an injunction in any case involving labor disputes except in conformity with its precise procedural requisites. A hearing must be held. All known persons against whom relief is sought must be given due and personal notice of such hearing. The case on behalf of the complainant must be made by witnesses under oath in open court and subject to cross-examination,[43] and the court can only grant relief after findings of fact on these issues:

> "(a) That unlawful acts have been committed and will be continued unless restrained;"
>
> "(b) That substantial and irreparable injury to complainant's property will follow;"
>
> "(c) That as to each item of relief sought greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;"
>
> "(d) That complainant has no adequate remedy at law; and"
>
> "(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Our report of existing practice amply explains the reasons for these safeguards in the preliminary process of fact-finding.[44] Only clauses (c) and (e) of section 7 in connection with section 7a above require an additional word.[45] We have referred to the political difficulties confronting the federal judiciary through its

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ratification of such acts after actual knowledge thereof." This applies accepted doctrines of agency to labor litigation. As to the need for such legislation, in view of the liability established by the Coronado Coal Case (259 U. S. 344 (1922)), see *supra* Chapter II, p. 74 *et seq.;* note (1929) 42 HARV. L. REV. 550. The section is discussed at length in the Senate Hearings on S. 1482, pp. 759-63.

[43] Section 7 begins as follows: "No court of the United States shall have jurisdiction to issue an injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath. . . ." That witnesses may be heard also in behalf of the defendants ought not to be left in doubt.

[44] See *supra* Chapter II; note (1928) 41 HARV. L. REV. 909.

[45] Clauses (b) and (d) are the usual requisites of equity jurisdiction. Clause (a) differs from what is the present view, in that it requires the actual commission of an unlawful act and not merely the *threatened* commission of such an act.

interventions in industrial conflicts.[46] Injunctions ought never to become routine. As the present Chief Justice once observed:

> "Government of the relations between capital and labor by injunction is a solecism. It is an absurdity. Injunctions in labor disputes are merely the emergency brakes for rare use and in case of sudden danger." [47]

No one can examine the record of litigation in the federal courts [48] and continue to believe that the Chief Justice's warning has been heeded. The curb proposed in clause (c) is merely a paraphrase of the accepted doctrine of equity that issuance of a temporary injunction must rest upon a balance of convenience,[49] but makes it explicit because experience has revealed the temptations to neglect this doctrine in labor controversies. Courts will thus have to consider more sharply, not merely the case for the complainant, but also the union's stake in the controversy—its actual investment of time and money in the organization and conduct of the strike and, most important, the irretrievable damage to a strike that later reversal or modification of an injunction cannot ameliorate.[50] Clause (e) aims at judicial confirmation of the conventional assertion by complainants who seek injunctions that the normal police facilities are inadequate to cope with the situation. Violence and other breaches of the peace are concededly the primary concern of the police and the machinery of the criminal law. To require, therefore, proof by complainant to the court's satisfaction that the normal resources of government "are unable or unwilling to furnish adequate protection" emphasizes official responsibility and at the same time checks dangerous shortcuts in the enforcement of the criminal law.

Section 7a is an application of two familiar maxims of equity—"he who comes into equity must come with clean hands," and "he who seeks equity must do equity." It is surely a fair requirement that one who invokes the extraordinary jurisdiction of a court should prove that he has exhausted all reasonable means for the peaceful settlement of a labor dispute. Legal rights do not necessarily define moral claims. Legal rights are not even the measure of equitable relief. A wise social policy may well consider the manner in which parties exercise their legal rights before putting all the coercive powers of society behind those rights.

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[46] See *supra* p. 205.

[47] From an interview published in the *Philadelphia Public Ledger,* November 20, 1919, at p. 8.

[48] See Appendix I.

[49] Note that it is "as to each item of relief sought" that the injuries must be balanced. For the significance of this phrase, see *supra* Chapter III, p. 115 *et seq.*

[50] Such details are not spelt out in the clause itself, and this might well be done.

Section 7 of the proposed bill continues the availability of a restraining order without notice in the event that "a substantial and irreparable injury to complainant's property will be unavoidable." [51] But the free play of such orders under the existing law is tightened by requiring proof of the allegations in the complaint by sworn testimony rather than by affidavit, and by terminating its force after five days. We have dwelt upon the perfunctoriness that characterizes the existing mechanism in granting *ex parte* orders and the irreparable consequences of their improvident use. Judges in the privacy of their chambers or of their homes, when once satisfied that the papers before them comply with the requisite *form,* have not hesitated to sign decrees. An examination of the detailed history of federal cases discloses that perhaps the most serious abuse in the present state of the law is due to the elastic clause of the Clayton Act which permits such *ex parte* orders to remain effective for ten days and to be extended by the court "for good cause shown." As a result, the restraining order has frequently been kept alive for weeks and months.[52] There is only one possible justification for qualifying the basic principle of giving parties an opportunity to be heard before action against them: the needs of an emergency may outweigh the risks of one-sidedness and consequent hardship. When, however, applicants for such orders spend many days in framing affidavits by the score and perfecting their complaints, and, on occasion, as did the United States Government in the Railway Shopmen's Strike, allow themselves time to put the whole mass of documents through the press under cover of utmost secrecy lest anyone discover that an application to a court is contemplated—the inference must follow that emergency claimed is emergency feigned.[53] Surprise is obviously the tactical advantage sought through such an order.

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[51] The entire bill is reprinted as Appendix IX.

[52] See Appendix I.

Is it wise for courts of equity, particularly federal courts, under these circumstances to countenance dispensation of the prime requisites of due process,—notice and opportunity to be heard? [54] This question, indeed, raises a serious doubt as to the adequacy of the five-day limitation as a corrective. Certainly the time limit as phrased should be strengthened, at least by an express provision that the order be not renewable. The really adequate solution would be abolition of *ex parte* restraining orders in these cases, based upon a realization that the *ex parte* order possesses potentialities of great evil and is too rarely of sufficient immediate necessity to outweigh the dangers of its abuse. Such, it may be recalled, was the recommendation made in earlier years by the present Chief Justice and would be a return to the historic rule in the federal courts.[55] Wisconsin conforms its law to experience by denying restraining orders in labor disputes except upon forty-eight hours notice.[56]

Another grave defect in the actual practice governing labor injunctions is dilatoriness in appeals. Our Table of Federal Cases shows the inordinate length of time that elapses between the first issuance of a decree and its consideration by an appellate tribunal.[57] Time is of the essence in a strike. If modification or reversal of an injunction is to have any value, it must come before the energies of a strike have been spent. To assure expedition of appeals is the object of section 7c:

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[53] Another sidelight upon the claim of emergency is afforded by a comparison in number between cases of application for temporary relief after a strike was already in progress and cases where the application was made before a strike was called. Presumably in the first situation there was no compelling emergency as to time. In the ten-year period from 1918 to 1928, twenty-eight cases of the first classification and only six of the second were reported. We are indebted to Mr. W. C. Waring, Jr., for these figures. See *supra* note 20.

[54] The psychologic significance of an opportunity to be heard was recently pointed out by Mr. Justice Eve in the General Booth Case: "The more certain the judicial body was, [that General Booth was physically disabled from continuing command] the more necessary it was that they should listen to every possible argument which would prevent their coming to that conclusion of it." *London Times,* Jan. 31, 1929, p. 5.

[55] See *supra* Chapter IV, p. 183, n. 189. In this connection, the requirements in suits to restrain orders of the Interstate Commerce Commission are significant. "Where irreparable damage will otherwise ensue" the majority of a court of three judges may "allow a termporary stay or suspension" of the operation of such an order, but only "on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General. . . ." Act of Oct. 22, 1913, 38 STAT. 219, 220; 28 U. S. C. § 47.

[56] WIS. STAT. (1927) § 133.07. A bill introduced in the 1929 session of the New York legislature provided that no restraining order shall be allowed in an "industrial dispute" except upon three days' notice of hearing. Assembly Bill No. 51. If need be, it might be provided that such hearing be had upon affidavits and not necessarily by testimony of witnesses in open court.

> "Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, forthwith certify the entire record of the case, including a transcript of the evidence taken, to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character." [58]

Section 8, giving the right to a speedy trial by jury for contemnors of injunctions when prosecuted for criminal contempt, is broader than the provisions of the Clayton Act in that the right to jury trial is not confined to such contempts as are also criminal offences.[59] We have already indicated the cases that lead to this proposal and summarized the arguments that favor such legislation.[60] The theoretical objection that juries will embarrass effective vindication of the court's authority has been disproved by experience under the Clayton Act since 1914. The bill leaves untouched several aspects of the enforcement machinery that call for legislative clarification and correction. Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt. The judicial discretion as to sentence and punishment in case of conviction should, as in ordinary criminal cases, be carefully defined. The prosecution should be conducted by government attorneys whose conduct would not suffer from the inevitable partisanship and individual interests that now accompany the conduct of such prosecutions by attorneys for the complainant.

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[57] See Appendix II, for summary of modifications and reversals of temporary injunctions.

[58] Provision should be made for inclusion, in the record on appeal, of all proceedings before the court at any *ex parte* hearing for a restraining order.

[59] See *supra* Chapter IV, p. 182, n. 189. Furthermore, the jury trial provision is also made applicable to alleged contempts committed in disobedience of injunctions entered in actions brought in the name of the United States, and in this respect, too, differs from the Clayton Act. The lively interest in safeguarding abuses latent in contempt proceedings is manifested in the number of bills upon the subject introduced during the Seventieth Congress. H. R. 99; H. R. 13293; S. 849; S. 4202, 70th Cong., 1st. Sess.

Regulation of contempt is an active subject of legislative effort also in state legislatures. A bill introduced in the 1929 session of the New York legislature provides for trial by jury in every prosecution for "contempt arising out of an alleged failure or refusal to obey any mandate of the court . . . in any industrial dispute." Assembly Bill No. 51. This would remove even the possibility of a prosecution for civil contempt unless a jury trial were provided. That civil contempt and a resulting infliction of damages which the defendants are unwilling to pay may result in a jail sentence, see testimony as to the Allen A. strike in Wisconsin and the injunction of Judge Geiger (Senate Hearings on S. 1482, p. 787 *et seq.*) For the distinction between civil and criminal contempt, see *supra* Chapter III, p. 127.

The bill is not a comprehensive code of labor law for the federal courts, nor even an all-inclusive formulation of procedural safeguards to remedy revealed defects. The measure under discussion merely deals with the most insistent issues presented by the labor injunction as utilized by the federal courts. Within its narrow scope it is the most considered legislative effort that has yet come before Congress, attempting to grapple candidly with the difficulties of intervention by law in the controversies of industry. The bill has neither partisan nor class origin.[61] It was not drawn to express the desires of any industrial group nor the views of a particular economic sect. The proposals are guided by experience in the actual operation of labor injunctions, and reflect the mature opinion of disinterested experts. The remedies suggested are intended to meet the specific difficulties and abuses that have come to the surface, in the light of problems peculiar to labor controversies. They also attempt to fit the labor injunction more harmoniously into the general scheme of equity jurisdiction.

By no means is this bill the last word. The searching scrutiny of sympathetic critics doubtless will disclose defects in draftsmanship and substance. But the main ideas underlying the bill should be translated into law. And upon the leaders of the Bar mainly depends whether such a measure of moderation will prevail, or whether grievances will remain uncorrected, as has been too often the history of procedural reform, until feelings not disciplined by insight into the processes of law dominate legislation. If the men of influence in the profession uncompromisingly resist these proposals, they will fail. But the real sufferer will be Law.

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[60] See *supra* Chapter IV, p. 193.

[61] Having long entertained the views expressed herein, one of the present writers, at the suggestion of the Senate Subcommittee on the Judiciary, collaborated with others like-minded in drafting the bill under discussion.

"The law is a public profession by which, more than by any other profession, the economic life and the government of the country are moulded." This is the judgment of Elihu Root.[62] One would be a complacent optimist, indeed, who would take pride in the influence exerted by the Bar upon our public affairs in recent times. That the prestige of lawyers has diminished was the weighty judgment of the late Lord Bryce.[63] According to the magistral pronouncement in President Hoover's Inaugural, the supremacy of law has been still more threatened since Bryce wrote. For this condition, the qualities of professional leadership bear a prime responsibility. In a familiar passage, Dean Pound has portrayed the ruling influences of the Bar:

> "Today leadership seems to have passed to the client-caretaker. The office of a leader of the bar is a huge business organization. Its function is to advise, to organize, to reorganize, and direct business enterprises, to point out dangers and mark safe channels and chart reefs for the business adventurer, and in our older communities to act, as one might say, as a steward for the absentee owners of our industries. The actual administration of justice in the courts interests him only as it discloses reefs or bars or currents to be avoided by the pilot of business men. Thus the leaders of the bar in the cities are coming to be divorced not only from the administration of criminal justice, but from the whole work of the courts, and the most effective check upon judicial administration of justice is ceasing to be operative."[64]

No wonder that Mr. Root has admonished the Bar against its preoccupation with private interests and its neglect of the public welfare.[65] This attitude, with meagre exceptions, characterizes the leading names in the profession. By all means, let us cleanse the temples of justice. Let us drive out the ambulance-chasers, and other chasers. By all means, let us insist on a richer cultural background for lawyers, a more intensive and riper legal education. But intellectual mastery is not enough. Indeed, a highly-educated Bar is more dangerous to society than one superficially trained, if such mastery is wielded by men who identify the advancement of private interests or the promotion of pernicious abstractions regarding "freedom" and "equality" with the purposes of law in our industrialized democracy. If it be true, and it is true, that the law, more than any other profession moulds "the economic life and the government of the country," then the Bar must be equipped by its insight and its ideals to guide the country into ways which make the good life possible. Law schools and legal scholarship may do much—but only if the leaders of the Bar devote themselves to those public duties which they profess.

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[62] (1921) 46 A. B. A. Rep. 678, 684 (report by Elihu Root *et al* to the American Bar Association).

[63] 2 Bryce, American Commonwealth (1924 ed.) 673 *et seq.*; Bryce, *America Revisited* (1905) 79 Outlook 733, 734-35.

[64] Pound, *Criminal Justice in the American City* in Pound and Frankfurter, Criminal Justice In Cleveland (1922) 603.

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[65] Root, *Public Service by the Bar* (1916), 41 A. B. A. Rep. 355.

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APPENDIX I

LITIGATION HISTORY OF REPORTED FEDERAL LABOR INJUNCTION CASES

CASE	EX PARTE RESTRAINING ORDER DATE	HEARING ON TEMPORARY INJUNCTION *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	APPEAL FROM TEMPORARY INJUNCTION DATE AND RESULT OF DECISION	PROCEEDINGS IN CONTEMPT OF RESTRAINING ORDER OR TEMPORARY INJUNCTION*	HEARING ON FINAL DECREE *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	APPEAL FROM FINAL DECREE DATE AND RESULT OF DECISION
1. Aeolian Co. v. Fischer		*a.* Complaint and affidavits *b.* Denied May 15, 1928, 27 F. (2d) 560 (S.D.N.Y.)	*Aff'd* by C. C. A. 2d Dec., 1928 29 F. (2d) 679			
2. Clarkson Coal Mining Co. v. United Mine Workers	Bill filed and restraining order granted Aug. 15, 1927	*a.* Complaint and affidavits *b.* Granted Sept. 12, 1927 (unreported but mentioned in 23 F. (2d) 208)		One person convicted after trial without jury. *Aff'd* by C. C. A. 6th, Dec. 7, 1928, *sub nom.* Minerich v. United States, 29 F. (2d) 565. *Certiorari* denied March 11, 1929, 49 Sup. Ct. 264		
3. Journeymen Stone Cutters Assn. v. United States	Bill filed Feb. 28, 1927				*a.* Sept. 19-26, 1927 *b.* Hearing of witnesses *c.* Granted D. C. N. Y., Oct. 24, 1927	Appeal dismissed, Nov. 19, 1928, 278 U. S. 566
4. Barker Painting Co. v. Brotherhood of Painters, *etc.*		Bill dismissed	*Aff'd* by Court of Appeals of District of Columbia Nov. 7, 1927. 23 F. (2d) 743			
5. Armstrong v. United States	Bill filed and restraining order granted June 2, 1926, Granted same day	*a.* Complaint and affidavits of both sides *b.* Granted July 3, 1926		Two persons convicted after trial without jury. *Aff'd* by C. C. A. 7th, March 30, 1927 (18 F. (2d) 371)		
6. Bedford Cut Stone Co. v. Stone Cutters Assn	Bill filed Oct. 2, 1924	*a.* Complaint and affidavits *b.* Denied Nov. 13, 1924	*Aff'd* by C. C. A. 7th Oct. 28, 1925, 9 F. (2d) 40. *Rev'd* by Supreme Court, 274, U. S. 37, Apr. 11, 1927 (two Justices dissenting)			
7. Red Jacket Consolidated Coal and Coke Co. v. Lewis, *et al.*	Bill filed Sept. 20, 1920	*a.* Pleadings and affidavits *b.* Granted Nov. 3, 1920			*a.* May 23, 1923 *c.* Granted Oct. 16, 1925	Briefs filed Oct. 4, 13, 1926 and Nov. 15, 1926. *Aff'd* Apr. 18, 1927 by C. C. A. 4th, (18 F. (2d) 839. *Certiorari* denied by Supreme Court, 275 U. S. 536, Oct. 17, 1927
8. Borderland Coal Corp. v. International Organization, United Mine Workers of America	Bill filed Sept. 26, 1921 by complainant "on behalf of itself and on behalf of 62" other coal companies	*a.* Pleadings, motions to dismiss complaint, and affidavits *b.* Granted April 8, 1922	Modified June 8, 1922 by C. C. A. 4th, *sub nom.* Keeney v. Borderland Coal Corp., 282 Fed. 269		*a.* May 23, 1923 *b.* "Evidence" (?) *c.* Granted Oct. 16, 1925	*Semble* as case 7 *supra*
9. Alpha Pocahontas Coal Co. v. International Organization, United Mine Workers of America	Bill filed April 8, 1922 by complainant jointly with 57 other plaintiffs	*a.* Pleadings (complaint and answer) *b.* Granted April 25, 1922	Modified July 19, 1922 by C. C. A. 4th, *sub nom.* Dwyer *et al.* v. Alpha Pocahontas Coal Co. *et al.* 282 Fed. 270		*a.* May 23, 1923 *b.* "Evidence" (?) *c.* Granted Oct. 16, 1925	*Semble* as case 7 *supra*
10. Aetnae Sewell Smokeless Coal Co. v. International Organization, United Mine Workers of America	Bill filed April 14, 1922 by complainant jointly with 75 other coal companies. Granted same day	*b.* Granted April 29, 1922	*Semble* as case 9 *supra*		*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
11. Dry Branch Coal Co. v. International Organization, United Mine Workers of America	Bill filed April 15, 1922 by complainant jointly with 15 other coal companies	*a.* Complaint and answer *b.* Granted April 29, 1922	*Semble* as case 9 *supra*		*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
12. Nelson Fuel Co. v. International Organization, United Mine Workers of America	Bill filed April 24, 1922 jointly with 6 joint plaintiffs	*a.* Complaint, answer and affidavits *b.* Granted May 8, 1922	*Semble* as case 9 *supra*		*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
13. Leevale Coal Co. v. International Organization, United Mine Workers of America	Bill filed May 22, 1922 jointly with 1 other coal company	*a.* Complaint and affidavits *b.* Granted June 28, 1922	Modified Dec. 6, 1922 by C. C. A. 4th, 285 Fed. 32		*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
14. Seng Creek Coal Co. v. International Organization, United Mine Workers of America	Bill filed June 1, 1922 jointly with 1 other coal company	*a.* Complaint and affidavits *b.* Granted June 19, 1922 in terms of mandate of C. C. A. 4th in case 8 *supra* (282 Fed. 269)			*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
15. Raleigh-Wyoming Coal Co. v. International Organization, United Mine Workers of America	Bill filed June 3, 1922 jointly with 2 other coal companies	*Semble* as case 8 *supra*			*Semble* as case 9 *supra*	*Semble* as case 7 *supra*

* In a few instances, the contempt was of the final injunction.

CASE	EX PARTE RESTRAINING ORDER DATE	HEARING ON TEMPORARY INJUNCTION *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	APPEAL FROM TEMPORARY INJUNCTION DATE AND RESULT OF DECISION	PROCEEDINGS IN CONTEMPT OF RESTRAINING ORDER OR TEMPORARY INJUNCTION	HEARING ON FINAL DECREE *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	APPEAL FROM FINAL DECREE DATE AND RESULT OF DECISION
16. Anchor Coal Co. v. International Organization, United Mine Workers of America	Bill filed June 19, 1922 jointly with 72 other complainants	*a.* Complaint and answer denying allegations of bill *b.* Granted July 4, 1922—*Semble* as case 8 *supra*			*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
17. Sterling Block Coal Co. v. International Organization, United Mine Workers of America	Bill filed July 4, 1922 jointly with 8 other plaintiffs	*a.* Complaint and affidavits *b.* Granted July 24, 1922—*Semble* as case 8 *supra*			*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
18. Carbon Fuel Co. v. International Organization, United Mine Workers of America	Bill filed Sept. 18, 1922 jointly with 24 other plaintiffs	*a.* Complaint and affidavits *b.* Granted March 10, 1923	Modified May 7, 1923 by C. C. A. 4th, 288 Fed. 1020		*Semble* as case 9 *supra*	*Semble* as case 7 *supra*
19. Columbus Heating and Ventilating Co. v. Pittsburgh Bldg. Trades Council	Bill filed and restraining order granted Dec. 5, 1926	*a.* *b.* Granted, but dismissed as to 3 individuals not members of the Pittsburgh Bldg. Trades Council, Feb. 1, 1927, 17 F. (2d) 806 (W. D. Pa.)				
20. Barker Painting Co. v. Brotherhood of Painters, *etc.*	Bill filed Nov. 24, 1925	*b.* Denied Jan. 11, 1926	*Aff'd* Oct. 2, 1926 by C. C. A. 3d, 15 F. (2d) 16			
21. Bittner v. West Virginia-Pittsburgh Coal Co.	Bill filed May 11, 1925	*a.* Complaint and affidavits of plaintiff and motion to dismiss *b.* Granted May 19, 1925 Motion to dissolve this injunction denied but decree modified June 2,1925	Modified Oct. 29, 1926 by C. C. A. 4th, 15 F. (2d) 652			
22. Staudte & Rueckoldt Mfg. Co. v. Carpenters' District Council	Bill filed and restraining order granted Feb. 17, 1923	*a.* Complaint and answer *b.* Granted Feb. 9, 1924	Order dismissing complaint entered Oct. 6, 1924, set aside by C. C. A. 8th, May 1, 1926, 12 F. (2d) 867			
23. J. C. McFarland Co. v. O'Brien	Bill filed March 25, 1925	*a.* Bills and affidavits *b.* Denied April 10, 1925, 6 F. (2d) 1016 (N. D. Ohio)				
24. J. I. Haas, Inc. v. Local Union No. 17 *etc.*		*a.* Complaint and motion to dismiss *b.* Granted injunction July 11, 1924, 300 Fed. 894 (D. Conn.)				
25. Waitresses Union v. Benish Restaurant Co., Inc.	Bill filed Jan. 14, 1924	*a.* Affidavits *b.* Granted Jan. 31, 1924	*Aff'd* by C. C. A. 8th, June 4, 1925, 6 F. (2d) 568			
26. Sullivan *et al.* v. United States	Bill filed and restraining order granted July 12, 1922	*a.* *b.* Granted July 21, 1924		Aug. 14, 1922—2 persons convicted of contempt. *Aff'd* by C. C. A. 8th, Jan. 20, 1925, 4 F. (2d) 100		
27. United Mine Workers of America Dist. No. 17 v. Chafin		*a.* Bill of complaint and motion to dismiss *b.* Motion to dismiss granted Feb. 17, 1923, 286 Fed. 959 (S. D. W. Va.)				
28. Western Union Tel. Co. v. International B. of E. Workers	Bill filed June 5, 1924	*a.* Bill and affidavits *b.* Granted July 16, 1924, 2 F. (2d) 993 (D. C. N. D. Ill.)	*Aff'd* by C. C. A. 7th, June 1, 1925, 6 F. (2d) 444			
29. Reeder v. Morton-Gregson Co.	Bill filed and restraining order granted Dec. 16, 1921			Jan. 7, 1922—2 persons convicted of contempt after trial by District Judge. *Aff'd* C. C. A. 8th, Feb. 29, 1924, 296 Fed. 785		
30. Chicago, St. Paul, M. & O. Ry. Co. v. R. A. Hening *et al.*	Bill filed and restraining order granted July 20, 1922	*a.* Bill, answer and affidavits *b.* Granted Aug. 18, 1922		Contempt proceedings filed Aug. 18, 1922 against 12 persons. All convicted after trial by judge without jury. Fined $10. to $100. each Aug. 29, 1922. *Aff'd* by C. C. A. 7th, Sept. 21, 1923, 291 Fed. 940, *sub nom.* Michaelson *et al.* v. United States. *Rev'd* by Supreme Court Oct. 20, 1924, 266 U. S. 42		

Case	Ex Parte Restraining Order Date	Hearing on Temporary Injunction *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	Appeal from Temporary Injunction Date and Result of Decision	Proceedings in Contempt of Restraining Order or Temporary Injunction	Hearing on Final Decree *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	Appeal from Final Decree Date and Result of Decision
31. Cohen v. United States (2 injunctions)	(1) Bill filed and restraining order granted July 27, 1922 (2) Bill filed and restraining order granted July 29, 1922	*a.* Bill of complaint and motion to dismiss *b.* Granted Aug. 14, 1922		Conviction for contempt after trial by District Judge. *Rev'd* by C. C. A. 6th, Feb. 13, 1924, 295 Fed. 633		
32. Missouri-Pacific R. Co. v. Int'l. Ass'n. of Machinists	Granted July 20, 1922 on verified bill and affidavits.			Trial Oct. 26–28, 1922 of 10 persons by judge and jury. 5 acquitted, 4 convicted, 1 disagreement. Convictions *aff'd.* Lawrence v. United States, 297 Fed. 418 (C. C. A. 8th 1924)		
33. Pere Marquette R. Co. v. Union	Bill filed and restraining order granted July 18, 1922	*a.* Affidavits *b.* Granted July 29, 1922		Conviction of newspaper editor after trial by judge without jury Oct. 19, 1922. *Rev'd* by C. C. A. 6th, May 7, 1922, reported *sub nom.* Cornish v. United States, 299 Fed. 283		
34. Montgomery v. Pacific Electric Ry. Co.	Granted upon verified bill July 2, 1918 at 9:30 P. M., 2 hours after strike was called in effect	*a.* Affidavits *b.* Granted July 12, 1918	*Aff'd* May 26, 1919 by C. C. A. 9th, 258 Fed. 382		*a.* Feb. 1922 *b.* Complaint, answer, affidavits and trial *c.* Granted	*Aff'd* Nov. 13, 1923 by C. C. A. 9th, 293 Fed. 680
35. McCourtney v. United States		*a.* Affidavits *b.* Granted July 22, 1922		Sept. 13, 1922—conviction of 3 persons after trial by jury. *Aff'd* by C. C. A. 8th, July 9, 1923, 291 Fed. 497		
36. Winkle v. United States		*a.* Affidavits *b.* Granted Aug. 8, 1922		Conviction of 2 persons after trial by jury. *Aff'd* by C. C. A. 8th, July 9, 1923, 291 Fed. 493		
37. United States v. Railway Employees' Dept., A. F. L.	Granted Sept. 1, 1922 on verified bill	*a.* Affidavits *b.* Granted Sept. 23, 1922, D. C. N. D. Ill., 283 Fed. 479. Motion to dissolve injunction denied upon answer and affidavits of defendants, Jan. 5, 1923, 286 Fed. 228			*a.* May 1, 1923 *b.* Trial—defendants had withdrawn appearances *c.* Granted July 12, 1923, 290 Fed. 978	
38. United States v. Taliaferro	Granted July, 1922 on bill	*a.* *b.* Granted Aug. 5, 1922		Oct. 2, 1922—conviction of 1 person after trial by court without jury, 290 Fed. 214. *Aff'd* by C. C. A. 4th, 290 Fed. 906		
39. Dunham v. United States	Petition filed July 11, 1922. Granted July 11, 1922 on affidavits			Aug. 21, 1922—1 person convicted by jury trial. *Aff'd* by C. C. A. 5th, April 24, 1923, 289 Fed. 376		
40. New York, N. H. & H. R. Co. v. Railway Employees' Dept.	Granted on verified bill—date probably July 29, 1922	*a.* Affidavits *b.* Hearings lasted 20 days. Injunction granted March 23, 1923 by D. C. Conn. 288 Fed. 588				
41. Portland Terminal Co. v. Foss	Granted July 17, 1922 on bill filed July 17, 1922	*a.* Agreed statement of facts *b.* Granted July 29, 1922, D. C. Maine, 283 Fed. 204	Injunction dissolved Feb. 13, 1923, 287 Fed. 33, C. C. A. 1st			
42. Great Northern Ry. Co. v. Brosseau	Granted July 1, 1922. Continued after a full hearing	*b.* Granted Jan. 8, 1923 after full hearing, 286 Fed. 414				
43. United Leather W. I. U. v. Herkert & Meisel Trunk Co.	Granted May 7, 1920 on verified complaint and affidavits	*a.* Affidavits, complaint and answer *b.* Granted Sept. 16, 1920			*a.* Sept. 25, 1920 *b.* Affidavits *c.* Granted Nov. 26, 1920, D. C. Mo., 268 Fed. 662	*Aff'd* by C. C. A. 8th, Oct. 19, 1922, 284 Fed. 446. *Rev'd* 265 U. S. 457 June 9, 1924
44. Silverstein v. Local No. 280 Journeymen Tailors' Union	Granted Sept. 8, 1921 on complaint and affidavit	*a.* Complaint, answer and affidavits *b.* Denied and restraining order dismissed Nov. 22, 1921	*Aff'd* by C. C. A. 8th, Oct. 19, 1922, 284 Fed. 833			

Case	Ex Parte Restraining Order Date	Hearing on Temporary Injunction a. Nature of Evidence b. Date Granted, Modified or Denied	Appeal from Temporary Injunction Date and Result of Decision	Proceedings in Contempt of Restraining Order or Temporary Injunction	Hearing on Final Decree a. Date b. Nature of Evidence c. Date Granted, Modified or Denied	Appeal from Final Decree Date and Result of Decision
45. Great Northern Ry. Co. v. Local G. F. L. of I. A. M.	Granted July 27, 1922 as to some of the defendants who had not been given notice of suit	b. Granted July 27, 1922, D. C. Mont., 283 Fed. 557 Granted Sept. 8, 1922 as to the defendants who were subject to restraining order				
46. Canoe Creek Coal Co. v. Christinson	Bill filed Jan. 23, 1922	a. Complaint and taking of testimony b. Granted Jan. 27, 1922. Another order granted after defendants' answer, Feb. 27, 1922		Conviction of 2 persons and acquittal of 3 after trial by court without jury May 1, 1922, D. C. Ky., 281 Fed. 559. Question certified to Supreme Court by C. C. A. 6th, Nov. 6, 1923, 293 Fed. 379. Convictions *rev'd* 266 U. S. 42		
47. Consolidated Coal & Coke Co. v. Beale	Granted—date uncertain	b. Granted—date uncertain, see 282 Fed. 934				
48. Gasaway v. Borderland Coal Corporation		a. Affidavits of both sides and complaint b. Granted Nov. 1, 1921, 275 Fed. 871	Modified by order of C. C. A. 7th, Dec. 15, 1921, 278 Fed. 56			
49. Lyons v. United States Shipping Board E. F. Corp.	Granted May 7, 1921 on bill	a. Complaint and affidavits b. Granted May 13, 1921	*Aff'd* by C. C. A. 5th, Jan. 19, 1922, 278 Fed. 144	Several persons convicted by jury trial. 2 cases reported *sub nom.* Newman *et al.* v. United States Shipping Board; Taylor v. United States Shipping Board, 278 Fed. 144, C. C. A. 5th, *aff'g* convictions		
50. Central Metal Products Corporation v. O'Brien		a. Complaint and affidavits b. Granted Jan. 5, 1922, D. C. Ohio, 278 Fed. 827. Supplemental bill, injunction granted—unreported	Appeal dismissed by C. C. A. 6th, Nov. 14, 1922, 284 Fed. 850. Injunction on supplemental bill *aff'd* by C. C. A. 6th, May 16, 1925, 5 F. (2d) 389			
51. Forrest v. United States	Granted May 21, 1921 on bill			1 person convicted by trial without jury (demand for jury denied). *Aff'd* by C. C. A. 9th, Jan. 9, 1922, 277 Fed. 873		
52. Danville Local Union No. 115 v. Danville Brick Co.	Granted May 5, 1921 on verified bill and affidavits	a. Complaint, answer and affidavits of both sides b. Granted June 7, 1921	*Rev'd* with directions to dismiss bill, C. C. A. 7th, July 27, 1922, 283 Fed. 909			
53. Kinlock Telephone Co. v. Local Union No. 2	Granted March 2, 1920 on bill and affidavits	a. Affidavits and evidence b. Denied and restraining order dissolved May 6, 1920, D. C. Mo., 265 Fed. 312	Order denying preliminary injunction *rev'd* by C. C. A. 8th, June 27, 1921, 275 Fed. 241			
54. Quinlivan v. Dail-Overland Co.	Granted June 7, 1919 on bill	a. Affidavits b. Granted June 18, 1919		1 person convicted—reference made in course of court's opinion, 274 Fed. 56	Granted Dec. 27, 1919, by D. C. Ohio, 263 Fed. 171	*Aff'd* by C. C. A. 6th, July 19, 1921, 274 Fed. 56
55. Charleston Dry Dock & Machine Co. v. O'Rourke		a. Complaint and affidavits of both sides b. Granted Aug. 11, 1921, by D. C. S. Car., 274 Fed. 811				
56. Langenberg Hat Co. v. United Cloth Hat and Cap Makers		a. Affidavits b. Granted—date uncertain			Granted June 11, 1920, by D. C. Mo., 266 Fed. 127	
57. King v. Weiss & Lesh Mfg. Co.	Granted Sept. 9, 1919 on bill	a. Complaint, answer and affidavits of both sides b. Granted, modifying restraining order Sept. 20, 1919			Granted Oct. 4, 1919	*Aff'd* by C. C. A. 6th, June 11, 1920, 266 Fed. 257
58. Buyer v. Guillan	Granted July 20, 1920 on bill and affidavits	a. Affidavits b. Denied, and restraining order vacated Aug. 24, 1920	*Rev'd* by C. C. A. 2nd, Feb. 2, 1921, 271 Fed. 65			
59. Davis v. Henry	Amended bill filed Feb. 7, 1920	b. Granted Feb. 12, 1920	*Rev'd* by C. C. A. 6th, Aug. 2, 1920, 266 Fed. 261			
60. Vonnegut Machinery Co. v. Toledo Machine & Tool Co.	Amended Bill filed Jan. 21, 1920. Temporary restraining order allowed after notice	a. Affidavits, complaint and answer b. Granted Feb. 7, 1920, D. C. Ohio, 263 Fed. 192				

Case	Ex Parte Restraining Order Date	Hearing on Temporary Injunction *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	Appeal from Temporary Injunction Date and Result of Decision	Proceedings in Contempt of Restraining Order or Temporary Injunction	Hearing on Final Decree *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	Appeal from Final Decree Date and Result of Decision
61. American Steel & Wire Co. v. Davis		*a.* Complaint, answer and affidavits *b.* Granted Dec. 17, 1919, D. C. Ohio, 261 Fed. 800				
62. Niles-Bement-Pond Co. v. Iron Molders' Union	Bill filed Sept. 14, 1917. Restraining order granted same day	*a.* Complaint, affidavits and testimony in court *b.* Granted Oct. 9, 1917, D. C. Ohio, 246 Fed. 851	*Rev'd* by C. C. A. 6th, Nov. 6, 1918, 258 Fed. 408. Appeal dismissed, Nov. 8, 1920, 254 U. S. 77			
63. Kroger Grocery & B. Co. v. Retail Clerks' I. P. Ass'n.		*a.* Affidavits *b.* Granted March 22, 1918, D. C. Mo., 250 Fed. 890				
64. Tosh v. West Kentucky Coal Co.	Bill filed Dec. 8, 1905			Two persons convicted by jury trial June 16, 1917. *Rev'd* by C. C. A. 6th, June 14, 1918, 252 Fed. 44 (final)	*c.* Granted Nov. 25, 1907	
65. Wagner Electric Mfg. Co. v. District Lodge, No. 9, I. A. of M.	Bill filed and restraining order granted same day—date uncertain	*a.* Complaint and notice to dismiss *b.* Motion denied and restraining order continued June 6, 1918, E. D. Mo., 252 Fed. 597				
66. Duplex Printing Press Co. v. Deering	Bill filed April, 1914. Granted April 13, 1914	*a.* Granted April 30, 1914			*a.* May 1917 *b.* Trial *c.* Denied, bill dismissed and temporary injunction vacated April 23, 1917, 247 Fed. 192	*Aff'd* by C. C. A. 2nd, 252 Fed. 722, May 25, 1918. *Rev'd* Jan. 3, 1921 (argued Jan. 22, 1920) by Supreme Court, 254 U. S. 443 (3 Justices dissenting)
67. Puget Sound Traction, Light & Power Co. v. Whitley	Denied on bill and affidavits July 25, 1917, D. C. Wash., 243 Fed. 945					
68. Stephens v. Ohio State Telephone Co.	Granted on bill and affidavits date uncertain	*a.* Complaint and affidavits *b.* Granted—date uncertain		Information for contempt filed. Motion to dismiss denied by D. C. Ohio, Feb. 14, 1917, 240 Fed. 759		
69. Tri-City Cent. T. Council v. American Steel Foundries	Granted on bill May 18, 1914	*a.* Complaint and affidavits *b.* Granted May 28, 1914			*c.* Granted June 9, 1914	*Rev'd* with direction to modify by C. C. A. 7th, 238 Fed. 728, Dec. 6, 1916. Decree of C. C. A. *rev'd* in part with direction to District Court to modify decree in accordance with opinion of Supreme Court, Dec. 5, 1921 (argued Jan. 17, 1919; June 1, 1920; Oct. 4–5 ,1921), 257 U. S. 184
70. Guaranty Trust Co. v. Electric Railway Employés		*a.* Complaint and affidavits *b.* Granted Oct. 30, 1916		One person convicted after trial by jury, sentenced to jail for 6 months and payment of costs. *Aff'd* by C. C. A. 8th, 1920, 264 Fed. 399 *sub nom.* Jennings v. United States		
71. Alaska S. S. Co. v. International Longshoremen's Ass'n	Granted on verified bill of complaint July 7, 1916	*a.* Trial *b.* Granted Sept. 5, 1916, D. C. Wash., 236 Fed. 964				
72. Oates v. United States (4 cases)	Granted on bill of complaint Sept. 29, 1913			Four persons convicted. *Rev'd* C. C. A. 4th, May 4, 1915, 223 Fed. 1013. Reconvicted on new trial before District Judge, *aff'd* C. C. A. 4th, May 2, 1916, 233 Fed. 201		
73. Eagle Glass & Mfg. Co. v. Rowe	Granted on verified bill of complaint and affidavits, July 28, 1913	*a.* Complaint, answer and affidavits *b.* Granted Jan. 17, 1914	*Rev'd* by C. C. A. 4th, Jan. 13, 1915, 219 Fed. 719. Decree of C. C. A. dismissing bill *rev'd* by Supreme Court and cause remanded to District Court Dec. 10, 1917, 245 U. S. 275 (3 Justices dissenting)			
74. West Virginia Coal Co. v. White	Granted on bill of complaint Sept. 29, 1913	*b.* Granted Dec. 2, 1913		Conviction on Jan. 17, 1914 by District Judge. *Aff'd* by C. C. A. 4th, Sept. 8, 1914, 217 Fed. 866, *sub nom.* Schwartz v. United States		

Case	Ex Parte Restraining Order Date	Hearing on Temporary Injunction *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	Appeal from Temporary Injunction Date and Result of Decision	Proceedings in Contempt of Restraining Order or Temporary Injunction	Hearing on Final Decree *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	Appeal from Final Decree Date and Result of Decision
75. United States v. Colo		*b.* Granted—date uncertain		Fourteen persons tried for contempt before District Judge, W. D. Ark., 7 convicted Sept. 1, 1914, 216 Fed. 654 (final)	*b.* Complaint, answer and affidavits *c.* Granted May 9, 1914	
76. Gill Engraving Co. v. Doerr		*a.* Affidavits *b.* Denied May 19, 1924, S. D. N. Y., 214 Fed. 111				
77. Bittner v. West Virginia-Pittsburgh Coal Co.	Granted on bill of complaint Sept. 29, 1913	*a.* Complaint, answer and affidavits *b.* Granted Dec. 2, 1913	Modified by C. C. A. 4th, March 28, 1914, 214 Fed. 716		*b.* Testimony taken before master *c.* Granted July 10, 1923, contempt proceedings dismissed, C. C. A. 4th, 11 F. (2d) 93	
78. Hitchman Coal & Coke Co. v. Mitchell	Bill filed and granted on Oct. 24, 1907	*a.* Bill of complaint and affidavits of plaintiff *b.* Granted May 26, 1908 Motion to dismiss bill April 7, 1909 denied Sept. 21, 1909 by District Judge, D. C. W. Va., 172 Fed. 963	Appeal from this denial dismissed by C. C. A. 4th, March 11, 1910, 176 Fed. 549		*b.* Trial *c.* Granted Dec. 23, 1912, D. C. W. Va., 202 Fed. 512	*Rev'd* by C. C. A. 4th May 28, 1914, 214 Fed. 685 with instructions to dismiss bill. C. C. A. 4th *rev'd* by Supreme Court Dec. 10, 1917, 245 U. S. 229 (3 Justices dissenting) and decree of District Court modified and as so modified, *aff'd*
79. Tunstall v. Stearns Coal Co.	Bill filed some time in December, 1908 and restraining order granted same date	*a.* Bill of complaint and affidavits *b.* Granted. A further injunction was later granted upon a supplemental bill	Appeal from the further injunction. Injunction *aff'd* by C. C. A. 6th, Dec. 5, 1911, 192 Fed. 808			
80. Sona v. Aluminum Castings Co.	Bill filed and granted Apr. 20, 1912	*a.* Complaint and answer *b.* Granted May 10, 1912		Two persons convicted for contempt of the preliminary injunction after trial by District Judge, D. C. Mich. *Aff'd* C. C. A. 6th, June 13, 1914, 214 Fed. 936		
81. Paine Lumber Co. v. Neal	Bill filed and restraining order granted Feb. 1911	*b.* Granted—date uncertain			*c.* Bill dismissed Nov. 1913, 212 Fed. 259, S. D. N. Y.	*Aff'd* by C. C. A. 2nd, April 7, 1914, 214 Fed. 82. *Aff'd* by Supreme Court June 11, 1917 (argued May 1915; reargued June 12, 1916), 244 U. S. 459 (3 Justices dissenting)
82. Irving v. Neal	Granted May 1910	*a.* Affidavits *b.* Granted July 1910, 180 Fed. 896, S. D. N. Y.			*c.* Granted Nov. 6, 1913, 209 Fed. 471, S. D. N. Y.	
83. Phillips S. & T. P. Co. v. Amalgamated Ass'n of I., S. & T. W.		*b.* Granted—date uncertain		Proceedings dismissed Sept. 27, 1913, S. D. Ohio, 208 Fed. 335.		
84. Carter v. Fortney	Bill filed and granted Jan. 20, 1909	*a.* Affidavits of both parties *b.* Granted Sept. 9, 1909, C. C. W. Va., 172 Fed. 722. Demurrer to bill overruled, C. C. W. Va., 170 Fed. 463		Proceeding for contempt of restraining order March 23, 1909	*b.* Trial *c.* Granted Sept. 11, 1911	*Aff'd* by C. C. A. 4th, March 8, 1913, 203 Fed. 454
85. Aluminum Castings Co. v. Local No. 84, I. M. U.	Granted April 27, 1912	*b.* Granted—date uncertain On motion to dissolve, dissolved in part and *aff'd.* in part, 197 Fed. 221, W. D. N. Y., June 17, 1912		Three persons convicted for contempt of restraining order June 15, 1912, 197 Fed. 220		
86. Illinois Cent. R. Co. v. International Ass'n of Machinists	Granted Oct. 4, 1911	*b.* Granted Oct. 23, 1911, C.C. Ill., 190 Fed. 910				
87. Loewe v. California State Federation of Labor		*a.* Complaint and affidavits *b.* Granted July 1, 1905, C. C. Cal., 139 Fed. 71			*b.* Affidavits and hearings before a master *c.* Granted July 25, 1911, C. C. Cal., 189 Fed. 714	
88. Kolley v. Robinson		*a.* Complaint, answer and master's report *b.* Granted March 4, 1910			*b.* Master's report *c.* Granted June 15, 1910	*Aff'd* by C. C. A. 8th, April 11, 1911, 187 Fed. 415
89. Hammond Lumber Co. v. Sailors' Union of the Pacific	Bill filed July 9, 1906 and granted July 13, 1906	*a.* Complaint *b.* Granted Aug. 8, 1906	*Aff'd* C. C. A. 9th, Oct. 7, 1907, 156 Fed. 450	Proceedings—demurrers overruled, C. C. Cal., Nov. 7, 1906, 149 Fed. 577; referred to examiner to take testimony; dismissed Jan. 20, 1909 by C. C. Cal., 167 Fed. 809		

CASE	EX PARTE RESTRAINING ORDER DATE	HEARING ON TEMPORARY INJUNCTION *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	APPEAL FROM TEMPORARY INJUNCTION DATE AND RESULT OF DECISION	PROCEEDINGS IN CONTEMPT OF RESTRAINING ORDER OR TEMPORARY INJUNCTION	HEARING ON FINAL DECREE *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	APPEAL FROM FINAL DECREE DATE AND RESULT OF DECISION
90. Iron Molder's Union v. Allis-Chalmers Co.	Bill filed and granted June 16, 1906	*a.* Complaint and answer *b.* Denied—date uncertain, but upon filing of a supplemental bill and additional affidavits, granted in Sept. 1906		8 persons convicted; proceedings against union dismissed, 150 Fed. 155, C. C. Wis., Dec. 11, 1906	*b.* "Submitted for final hearing" by consent *c.* Granted—date uncertain	Decree modified by C. C. A. 7th, Oct. 9, 1908, 166 Fed. 45
91. Employers' Teaming Co. v. Teamsters' Joint Council	Bill filed and granted April 28, 1905			1 person convicted by C. C. judge, 141 Fed. 679, which conviction *rev'd* by C. C. A. 7th, 163 Fed. 16, April 14, 1908		
92. Goldfield Consol. Mines Co. v. Goldfield M. U. No. 220		*a.* Complaint and answer *b.* Granted, C. C. Nev., March 7, 1908, 159 Fed. 500				
93. Delaware, L., & W. R. Co., v. Switchmen's Union	Granted Nov. 30, 1907	*a.* Affidavits *b.* Denied and restraining order vacated Dec. 13, 1907, W. D. N. Y., 158 Fed. 541				
94. A. R. Barnes & Co. v. Berry		*a.* Affidavits *b.* Granted, C. C. Ohio, Oct. 21, 1907, 156 Fed. 72			*c.* Bill dismissed Feb. 1, 1908, C. C. Ohio, 157 Fed. 883	
95. Bucks Stove & Range Co. v. Gompers	Bill filed Nov. 26, 1907	*a.* Affidavits and complaint *b.* Granted, D. of C., Dec. 18, 1907		3 persons convicted, 6, 9, and 12 months in jail. *Aff'd* 33 App. Cases 516, D. of C. *Rev'd* 221 U. S. 419	*b.* "Testimony regularly taken" *c.* Granted March 23, 1908	
96. National Telephone Co. v. Kent	Granted—date uncertain	*a.* Affidavits *b.* Granted—demurrer overruled by C. C. W. Va., Sept. 26, 1907, 156 Fed. 173				
97. Shine v. Fox Bros. Mfg. Co.	Granted on bill of complaint and affidavits Jan. 31, 1906	*a.* Trial *b.* Granted by C. C. Cal. March 6, 1906	*Aff'd* by C. C. A. 8th, Oct. 19, 1907, 156 Fed. 357			
98. Rocky Mountain Bell Tel. Co. v. Montana F. of L.		*a.* Affidavits on both sides *b.* Granted by C. C. Mont., Aug. 7, 1907, 156 Fed. 809				
99. Pope Motor Car Co. v. Keegan	Granted on bill Oct 5, 1906	*a.* Affidavits and oral testimony *b.* Modified so as not to include some defendants Nov. 7, 1906 by C. C. Ohio, 150 Fed. 148				
100. Order of R. R. Telegraphers v. Louisville & N. R. Co.		*a.* Complaint and demurrer *b.* Demurrer sustained—bill dismissed by C. C. Ky., Nov. 17, 1906, 148 Fed. 437				
101. Seattle Brewing & Malting Co. v. Hansen	Granted—date uncertain	*a.* Affidavits of both sides *b.* Granted by C. C. Cal., Dec. 2, 1905, 144 Fed. 1011				
102. Huttig Sash & Door Co. v. Fuelle	Granted on bill April 28, 1904			Proceedings in contempt of restraining order. Testimony taken before master-report finding all 5 parties guilty. *Aff'd* by C. C. Mo., March 1, 1906, 143 Fed. 363		
103. Kemmerer v. Haggerty	Granted on bill—date uncertain	*a.* Complaint and motion to dismiss *b.* Motion granted and restraining order dissolved, July 15, 1905, C. C. W. Va., 139 Fed. 693				
104. Atchison T. & S. F. Ry. Co. v. Gee	Granted on bill May 1904			Two convictions by C. C. Iowa July 10, 1905, 139 Fed. 582, Oct. 27, 1905, 140 Fed. 153		

CASE	EX PARTE RESTRAINING ORDER DATE	HEARING ON TEMPORARY INJUNCTION *a.* Nature of Evidence *b.* Date Granted, Modified or Denied	APPEAL FROM TEMPORARY INJUNCTION DATE AND RESULT OF DECISION	PROCEEDINGS IN CONTEMPT OF RESTRAINING ORDER OR TEMPORARY INJUNCTION	HEARING ON FINAL DECREE *a.* Date *b.* Nature of Evidence *c.* Date Granted, Modified or Denied	APPEAL FROM FINAL DECREE DATE AND RESULT OF DECISION
105. Chesapeake & O. C. A. Co. v. Fire Creek Coal & Coke Co.	Granted on bill of complaint July 31, 1902	a. Complaint and demurrer *b.* Granted, demurrer overruled by C. C. W. Va., Dec., 12, 1902, 119 Fed. 942	*Aff'd* C. C. A. 4th, July 17, 1903, 124 Fed. 305			
106. Gulf Bag Co. v. Suttner	Granted on affidavits and bill of complaint June 1903	*a.* Affidavits of both sides *b.* Granted July 27, 1903 by C. C. Cal., 124 Fed. 467				
107. Knudsen v. Benn		*a.* Affidavits *b.* Granted June 22, 1903 by C. C. Minn., 123 Fed. 636				
108. Wabash R. Co. v. Hannahan	Granted on bill of complaint March 3, 1903	*a.* Complaint, answer and affidavits *b.* Denied and restraining order vacated by C. C. Mo., April 1, 1903, 121 Fed. 563				
109. Union Pac. R. Co. v. Ruef	Granted on bill of complaint Sept. 15, 1902	*a.* Testimony taken before examiner *b.* Restraining order modified and dismissed as to some defendants by C. C. Neb. Nov. 8, 1902, 120 Fed. 102				
110. Castner v. Pocahontas Collieries Co.	Granted on verified bill of complaint July 16, 1902			Three persons held after preliminary hearing by a United States Commissioner pending next regular term of court. Petition for writ of *habeas corpus* denied by C. C. Va., July 31, 1902, 117 Fed. 184		
111. Boyer v. Western Union Tel. Co.		Bill dismissed upon demurrer, C. C. Mo., Aug. 17, 1903, 124 Fed. 246				
112. *Ex Parte* Richards	Granted on bill of complaint June 27, 1902			Attachment for contempt July 19, 1902. Convicted by C. C. W. Va., Aug. 13, 1902, 117 Fed. 658		
113. Guaranty Trust Co. v. Haggerty	Granted on verified bill of complaint June 19, 1902			Six convictions by C. C. W. Va., July 24, 1902, 116 Fed. 510. And see 116 Fed. 520		
114. Morton Trust Co. v. Virginia Iron, Coal & Coke Co.	Granted on petition of receiver Feb. 12, 1901. Another granted on petition of receiver Oct. 26, 1901			Two convictions by C. C. Va., March 25, 1902, 114 Fed. 950		
115. Reinecke Coal Co. v. Wood	Granted on verified bill of complaint Nov. 12, 1901	*a.* Affidavits *b.* Granted Dec. 23, 1901 by C. C. Ky., 112 Fed. 477				
116. Southern Ry. Co. v. Machinists' Local Union		*a.* Affidavits and complaint *b.* Granted by C. C. Tenn. Oct. 1, 1901, 111 Fed. 49				
117. Otis Steel Co. v. Local Union No. 218		*a.* Complaint, answer and affidavits *b.* Granted by C. C. Ohio, July 9, 1901, 110 Fed. 698				
118. Allis-Chalmers Co. v. Reliable Lodge		*a.* Complaint and affidavits *b.* Granted by C. C. Ill., Oct. 18, 1901, 111 Fed. 264				

APPENDIX II

Summary of Reported Federal Labor Injunction Cases (1901–1928)

I. *Total number of cases in which application was made for injunctive relief*			118
(1) Cases in which restraining orders are known to have been applied for		71	
Granted	70		
Denied	1		
(2) Cases in which available data do not disclose whether restraining order was applied for		47	
(3) Cases in which temporary injunctions are known to have been applied for		103	
Granted	88		
Denied	15		
(4) Cases in which no temporary injunction proceedings appear to have followed the restraining order		12	
(5) Cases in which final injunctions were applied for		33	
Granted	30		
Denied	3		

II. *Analysis of time element where dates are disclosed by available data*

A. TIME BETWEEN EX PARTE ORDER AND TEMPORARY INJUNCTION	RESTRAINING ORDER VACATED	RESTRAINING ORDER MODIFIED	TEMPORARY INJUNCTION IN SUBSTANTIALLY SIMILAR TERMS
10 days or less	0	0	3
11-30 days	2	1	15
More than 30 days	3	3	18

B. TIME BETWEEN TEMPORARY INJUNCTION AND DECISION ON APPEAL	AFFIRMED	MODIFIED	REVERSED
1-3 months	0	7	0
3-6 months	0	2	2
6-12 months	8	0	1
1-2 years	4	1	3
More than 2 years	1	0	2

Cases in which no appeal was taken from temporary injunction proceedings	68

C. TIME BETWEEN FINAL INJUNCTION AND DECISION ON APPEAL	AFFIRMED	MODIFIED	REVERSED
6-12 months	4	1	0
1-2 years	2	0	0
More than 2 years	12	1	3

Cases in which no appeal was taken from final decree	9

III. *Total number of contempt proceedings*			36
(1) Persons tried by judge without jury		81	
Convictions	71		
Acquittals	10		
(2) Persons tried by judge and jury		23	
Convictions	17		
Acquittals	5		
Disagreements	1		
(3) Persons appealing from convictions		58	
Affirmances	37		
Reversals	21		

Note: On April 13, 1928, two officials and twenty-four members of the Full Fashioned Hosiery Workers' Union were acquitted by a jury of contempt of court arising from alleged violations of a federal restraining order granted by Judge Geiger. (E. D. Wis.) *New York World*, April 25, 1928. (These proceedings are not reported officially and therefore are not included in the foregoing summary.)

APPENDIX III

New York Labor Injunction Cases

A—Cases arising in the City of New York and reported only in the New York Law Journal (1923–1927).

		LAW JOURNAL DATE	INJUNCTION PENDENTE LITE	COUNTY
1.	Friedman v. Menendez	Jan. 20, 1923	Denied	New York
2.	Sadowsky v. American Cloak Union	March 13, 1923	Granted	New York
3.	Jeanette v. Ninfo	March 17, 1923	Denied	New York
4.	Markowitz v. Sigman	May 3, 1923	Granted	New York
5.	Goldfarb v. Lesher	May 12, 1923	Granted	New York
6.	Weissberger v. Sigman	June 1, 1923	Denied	New York
7.	Schleifer v. Obermaier	Sept. 14, 1923	Granted	New York
8.	Maegert Co. v. White Goods Workers' Union	Oct. 8, 1923	Denied	New York
9.	Hoe Co. v. Keppler	Jan. 8, 1924	Granted	Queens
10.	Russell Co. v. Obermeier	May 10, 1924	Granted	New York
11.	Kraus v. Schachter	July 17, 1924	Granted	New York
12.	Post & McCord v. Morrin	July 25, 1924	Denied	New York
13.	Vogel v. Greenspan	Nov. 26, 1924	Granted	Kings
14.	Schlesinger v. Messing	Dec. 17, 1924	Granted	New York
15.	Bart v. Markowitz	Dec. 30, 1924	Granted	Kings
16.	Kayser v. Moore	Dec. 30, 1924	Granted	Kings
17.	Sarner v. Sigman	Jan. 9, 1925	Granted	New York
18.	Williamsburg Co. v. Greenfield	April 29, 1925	Granted	Kings
19.	Blake Laundry v. Berman	April 30, 1925	Granted	Kings
20.	United Baker Workers Union v. Messing	May 1, 1925	Granted	New York
21.	Leeds Co. v. Lewis	June 25, 1925	Granted	New York
22.	Roulston v. Igoe	July 8, 1925	Granted	Kings
23.	N. A. Iron Works v. Hofbauer	Sept. 9, 1925	Denied	Kings
24.	Belle Mead Co. v. Sigman	Dec. 22, 1925	Granted	New York
25.	Carnation Co. v. Basson	Dec. 29, 1925	Denied	Kings
26.	[illegible]	Dec. [illegible], 1925	Denied	New York
27.	Belle-Maid v. Sigman	Feb. 10, 1926	Denied	New York
28.	Weissman Co. v. Cosgrove	March 5, 1926	Granted	Kings
29.	Goldmark Co. v. Sigman	May 1, 1926	Denied	New York
30.	Greenfield & Co. v. Schachtman	May 20, 1926	Granted	New York
31.	Federal Slipper Co. v. Roth	May 21, 1926	Granted	New York
32.	Erasmus Service v. Lurie	July 1, 1926	Granted	Kings
33.	Feldman v. Goldberg	Aug. 16, 1926	Granted	Kings
34.	Tailored Woman v. Sigman	Sept. 1, 1926	Granted	New York
35.	Brenner v. Sigman	Sept. 10, 1926	Granted	New York
36.	Cloak etc. Mfrs. v. Sigman	Sept. 30, 1926	Granted	New York
37.	59th St., Madison Ave. Co. v. Musicians	Nov. 23, 1926	Granted	New York
38.	Syndicated Corp. v. Musicians	Nov. 23, 1926	Denied	New York
39.	Rosenbaum v. Freedman	Dec. 14, 1926	Granted	New York
40.	Jaeckel v. Schachtman	Dec. 14, 1926	Granted	New York
41.	Jaeckel v. Cohen	Dec. 14, 1926	Granted	New York
42.	Schlesinger v. Finkelstein	Jan. 7, 1927	Granted	New York
43.	Kurtzman v. Cohen	Jan. 27, 1927	Granted	Bronx
44.	Liebowitz v. Bronx Shoe Salesmen	April 1, 1927	Granted	Bronx
45.	Meltzer v. Kaminer	April 15, 1927	Granted	Kings
46.	Bolivian Hat Co. v. Finkelstein	April 25, 1927	Denied	New York
47.	Pechter v. Raimist	June 29, 1927	Denied	New York
48.	Herzog v. Cline	Nov. 30, 1927	Granted	Bronx

Summary of N. Y. Law Journal Cases (1923–1927)

Total number of applications for Injunctions *pendente lite*

Granted	35
Denied	13

APPENDIX III—*Continued*

NEW YORK LABOR INJUNCTION CASES

B—Cases reported in published reports (1920–1927).

					RESULT OF TEMPORARY* INJUNCTION PROCEEDINGS		RESULT OF PERMANENT* INJUNCTION PROCEEDINGS
					At Nisi Prius	*On Appeal*	
1.	Feb.	1920	Stuyvesant L. & B. Corp. v. Reiner	110 Misc. 357; 181 N. Y. Supp. 212	Granted		
2.	June	1920	Michaels v. Hillman	112 Misc. 395; 183 N. Y. Supp. 195	Granted		Granted
3.	June	1920	Grand Shoe Co. v. Children's Shoe Workers' U.	187 N. Y. Supp. 886	Granted		
4.	Oct.	1920	Jaeckel v. Kaufman	187 N. Y. Supp. 889	Granted		
5.	Dec.	1920	Welinsky v. Hillman	185 N. Y. Supp. 257	Granted		
6.	Jan.	1921	Wood Mowing & Reaping M. Co. v. Toohey	114 Misc. 185; 186 N. Y. Supp. 95	Granted		Temporary injunction vacated
7.	March	1921	Floersheimer v. Schlesinger	115 Misc. 9; 187 N. Y. Supp. 891	Granted		
8.	March	1921	Skolny v. Hillman	114 Misc. 571; 187 N. Y. Supp. 706	Granted		
9.	March	1921	Benito Rovira Co. v. Yampolsky	187 N. Y. Supp. 894	Granted		
10.	March	1921	Burgess Bros. Co., Inc., v. Stewart	114 Misc. 673; 187 N. Y. Supp. 873			Granted
11.	March	1921	Pre' Catelan v. Int. Fed. of Workers	114 Misc. 662; 188 N. Y. Supp. 29	Granted		
12.	March	1921	Friedman & Co., Inc. v. Amal. Cloth Workers	115 Misc. 44; 188 N. Y. Supp. 879	Denied		
13.	March	1921	United Traction Co. v. Droogan	115 Misc. 672; 189 N. Y. Supp. 39	Granted		
14.	March	1921	Schwartz & Jaffee, Inc. v. Hillman	115 Misc. 61; 189 N. Y. Supp. 21	Granted		
15.	April	1921	Piermont v. Schlesinger	196 App. Div. 658; 188 N. Y. Supp. 35	Granted	Reversed	
16.	July	1921	Arnheim, Inc. v. Hillman	198 App. Div. 88; 189 N. Y. Supp. 369	Denied	Granted	
17.	Nov.	1921	Gottlieb v. Matckin	117 Misc. 128; 191 N. Y. Supp. 777	Granted		
18.	Jan.	1922	Borden's Farm Pro. Co., Inc. v. Sterbinsky	117 Misc. 585; 192 N. Y. Supp. 757			Granted
19.	Jan.	1922	Segenfeld v. Friedman	117 Misc. 731; 193 N. Y. Supp. 128	Denied		
20.	May	1922	Schlesinger v. Quinto	201 App. Div. 487; 194 N. Y. Supp. 401	Granted	Affirmed	
21.	July	1922	Yates Hotel Co. v. Meyers	195 N. Y. Supp. 558	Granted		
22.	Nov.	1922	Edelman, Edelman & Berrie Inc. v. R. G. & D. C. Union	119 Misc. 618; 198 N. Y. Supp. 17	Granted		
23.	Feb.	1923	Altman v. Schlesinger	204 App. Div. 513; 198 N. Y. Supp. 128	Denied	Granted	
24.	May	1923	Yablonowitz v. Korn	205 App. Div. 440; 199 N. Y. Supp. 769	Denied	Granted	
25.	July	1923	Berg Auto Trunk & Speciality Co. v. Wiener	121 Misc. 796; 200 N. Y. Supp. 745	Granted		
26.	Aug.	1923	Best Service Wet Wash Laundry Co., Inc. v. Dickson	121 Misc. 416; 201 N. Y. Supp. 173	Granted		
27.	Aug.	1923	Albee & Godfrey Co., Inc. v. Arci	201 N. Y. Supp. 172	Denied		
28.	Feb.	1925	Traub Amusement Co., Inc. v. Macker	127 Misc. 335; 215 N. Y. Supp. 397			Granted
29.	May	1925	N. & R. Theaters, Inc. v. Basson	127 Misc. 271; 215 N. Y. Supp. 157	Denied		
30.	Oct.	1925	Bolivian Panama Hat Co., Inc. v. Finkelstein	127 Misc. 337; 215 N. Y. Supp. 399	Granted		
31.	Oct.	1925	Vail-Ballou Press, Inc. v. Casey	125 Misc. 689; 212 N. Y. Supp. 113	Granted		
32.	March	1926	Rentner v. Sigman	126 Misc. 781; 216 N. Y. Supp. 79	Granted		
33.	May	1926	Exchange Bakery & Restaurant, Inc. v. Rifkin	216 App. Div. 663; 215 N. Y. Supp. 753 *Rev'd* in 245 N. Y. 260	Denied	Finally *aff'd*	
34.	April	1926	Public Baking Co., Inc. v. Stern	127 Misc. 229; 215 N. Y. Supp. 537	Denied		
35.	April	1926	Cushman's Sons, Inc., v. Amalgamated F. W. B. etc.	215 N. Y. Supp. 401	Granted		
36.	April	1926	Bellin v. Millinery Workers Union, Local No. 24	127 Misc. 53; 216 N. Y. Supp. 68	Granted		
37.	March	1927	Daitch & Co., Inc. v. Retail Grocery & D. C. Union	218 App. Div. 80; 217 N. Y. Supp. 817; 129 Misc. 343; 221 N. Y. Supp. 446	Denied	Granted	Granted

*In some instances, the reports herewith analyzed do not indicate whether the injunction is temporary or final. To make certain would entail the prohibitive task of going to the original court records. In these instances, the classification herein involved judgment.

APPENDIX IV

A.—COMPARISON OF TEXTS[1]

OF

INJUNCTION IN DEBS CASE and	TEMPORARY RESTRAINING ORDER BY JUDGE WILKERSON IN RAILWAY SHOPMEN'S STRIKE
"It enjoined the following acts: (1) "Interfering with, hindering, obstructing, or stopping any of the business of" certain named railroads "as common carriers of passengers and freight between or among any States of the United States." (2) "Interfering with, hindering, obstructing or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce or carrying passengers or freight between or among the States." (3) "Interfering with, hindering, or stopping any trains carrying the mail," and "interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in con-	It enjoins the following: "(a) in any manner interfering with, hindering, or obstructing said railway companies or any of them, their agents, servants, or employees in the operation of their respective railroads and systems of transportation or the performance of their public duties and obligations in the transportation of passengers and property in interstate commerce and the carriage of mail, and from in any manner interfering with, hindering, or obstructing the agents, servants, and employees of said railway companies or any of them engaged in the inspection, repair, operation, and use of trains, locomotives, cars, and other equipment of said railway companies or any of them, (1)[2] and from preventing or attempting to prevent any person or persons

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[1] This material is taken from Frankfurter and Landis, *Power to Regulate Contempts* (1924) 37 HARV. L. REV. 1010, 1101 *et seq.*

[2] This series of parenthesized numbers will be used for purpose of cross-referencing in the Analysis following, (B), *infra*, p. 260.

nection with the carriage of passengers or freight between or among the States."

(4) "Interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purposes of or in connection with interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the States."

(5) "Entering upon the grounds or premises of any of said railroads for the purpose" of such interference, etc., "or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce," etc.

(6) "Injuring or destroying any part of the tracks, roadbed, or road or permanent structures of said railroads" or "injuring, destroying, or in any way interfering with any of the signals or switches of said railroads" or "displacing or extinguishing any of the signals of any of said railroads" or "spiking, locking, or in any manner fastening any of the switches of any of said railroads," or "uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce," etc. "or engaged in carrying any of the mails of the United States."

(7) "Compelling or inducing, or from freely entering into or continuing in the employment of said railway companies or any of them for the inspection and repairing of locomotives and cars, or otherwise; (2)

"(b) in any manner conspiring, combining, confederating, agreeing and arranging with each other or with any other person or persons, organizations or associations to injure or interfere with or hinder said railway companies, or any of them, in the conduct of their lawful business of transportation of passengers and property in interstate commerce and the carriage of the mail; (3) or to injure, interfere with, hinder or annoy any employee of said railway companies, or any of them, in connection with the performance of their duties as such employees or while going to or returning from the premises of said railway companies in connection with their said employment, (4) or at any time or place, by displays of force or numbers, the making of threats, intimidation, acts of violence, opprobrious epithets, jeers, suggestions of danger, taunts, entreaties, or other unlawful acts or conduct towards any employee or employees or officers of said railway companies, or any of them, or towards persons desirous of or contemplating entering into such employment; (5)

"(c) loitering or being unnecessarily in the vicinity of the points attempting to compel or induce by threats, intimidation, persuasion, force, or violence, any of the employees of any of said railroads to refuse or fail to perform any of their duties as employees of any of said railroads, or the carriage of the United States mail by such railroads, or the transportation," etc.

(8) "Compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employees of any of said railroads, who are employed by such railroads and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation," etc., "to leave the service of such railroads."

(9) "Preventing any person or persons whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof in the carrying of the mails of the United States or the transportation," etc.

(10) "Doing any act whatever in the furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation," etc.

(11) "Ordering, directing, aiding, and places of ingress or egress of the employees of said railway companies, to and from such premises, in connection with their said employment; (6) or aiding, abetting, directing, or encouraging any person or persons, organization, or association, by letters, telegrams, telephone, word of mouth, or otherwise to do any of the acts aforesaid; (7) trespassing, entering or going upon the premises of the said railway companies, or any of them, to do any of the acts aforesaid, or for any other purpose whatsoever, at any place or in the vicinity of any place where the employees of said companies or any of them are engaged in inspecting, overhauling, or repairing locomotives, cars, or other equipment, or where such employees customarily perform such duties or at any other place on the premises of said railway companies, or any of them, except where the public generally are invited to come to transact business with said railway companies as common carriers of passengers and property in interstate commerce; (8)

"(d) inducing or attempting to induce by the use of threats, violent or abusive language, opprobrious epithets, physical violence or threats thereof, intimidations, display of numbers or force, jeers, entreaties, argument, persuasion, rewards, or otherwise, any person or persons to abandon the employment of said railway companies, assisting, or abetting in any manner whatever any person or persons to commit any or either of the acts aforesaid."[3]

or any of them, or to refrain from entering such employment; (9)

"(e) engaging, directing, or encouraging others to engage in the practice commonly known as picketing; that is to say, assembling or causing to be assembled numbers of the members of said Federated Shop Crafts or others in sympathy with them in proximity with them of said railway companies, or any of them, at or in the vicinity where the employees thereof are required to work and perform their duties, or at or near the places of ingress or egress thereto or therefrom, and by threats, persuasion, jeers, violent or abusive language, violence or threats of violence, taunts, entreaties or argument, or in any other way prevent or attempt to prevent any of the employees of said railway companies or any of them from entering upon or continuing in their duties as such employees, or so to prevent, or attempt to prevent, any person or persons from entering or continuing in the employment of said railway companies, or any of them, and from aiding, abetting, ordering, assisting, directing, or encouraging in any way any person or persons in the commission of any of said acts; (10)

"(f) congregating upon or directing, aiding, or encouraging the congregating upon, or maintaining at or near any of the yards, shops, depots, terminals, tracks, waylands, roadbeds, or premises of said railway companies or any of them any guards, pickets, or persons to perform any act of guarding, picketing, or patrolling any such yards, shops, depots, terminals or other premises of said railway companies, or any of them; (11) and in any manner threaten, intimidate, by suggestions of danger or personal violence towards any servant or employee of said companies, or any of them, or towards persons contemplating the entering of such employment; (12) or aiding, encouraging, directing, or causing any other person or persons so to do;

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[3] From Government's Brief (pp. 8-10) by Richard Olney and Edward B. Whitney in *In re* Debs, Petitioner, 158 U. S. 564 (1895); for literal form of entire text of injunction, see Petition for a Writ of Habeas Corpus, pp. 18-21 (Record and Briefs, *In re* Debs, *supra*).

"(g) doing or causing or in any manner conspiring, combining, directing, commanding or encouraging the doing or causing the doing by any person or persons of any injury or bodily harm, to any of the servants, agents or employees of said railway companies, or any of them; (13) going singly or collectively to the homes, abodes, or places of residence of any employee of the said railway companies or any of them for the purpose of intimidating, threatening, or coercing such employee or member of his family, or in any manner by violence or threats of violence, or otherwise, directed towards any said employee or member of his family, induce or attempt to induce such employee to refuse to perform his duties as an employee of said railway companies, or any of them; from so attempting to prevent any person or persons from entering the employ of either of said railway companies,(14) and from aiding, encouraging, directing, commanding, or causing any person or persons so to do;

"(h) in any manner directly or indirectly hindering, obstructing or impeding the operation of any of the trains of said railway companies, or any of them, in the movement and transportation of passengers and property in interstate commerce or in the carriage of the mail, or in the performance of any other duty as common carriers, and from aiding, abetting, causing, encouraging, or directing any person or persons, association or organization to do or cause to be done any of the matters or things aforesaid;(15)

"(i) in any manner by letters, printed or other circulars, telegrams, telephones, word of mouth, oral persuasion, or suggestion, or through interviews to be published in newspapers or otherwise in any manner whatsoever, encourage, direct, or command any person whether a member of any or either of said labor organizations or associations defendants herein, or otherwise, to abandon the employment of said railway companies, or any of them, or to refrain from entering the service of said railway companies or either of them;(16)

"2. The said defendants, Jewell, McGrath, Scott, Johnston, Noonan, Kline, Ryan, Franklin, and Hynes, and each of them, as officers as aforesaid and as individuals, be restrained and enjoined from—

"(a) issuing any instructions, requests, public statements or suggestions in any way to any defendant herein or to any official or members of any said labor organizations constituting the said Federated Shop Crafts, or to any official or member of any system federation thereof with reference to their conduct or the acts they shall perform subsequent to the abandonment of the employment of said railway companies by the members of the said Federated Shop Crafts, or for the purpose of or to induce any such officials or members or any other persons whomsoever to do or say anything for the purpose or intended or calculated to cause any employee of said railway companies, or any of them, to abandon the employment thereof, or to cause any persons to refrain from entering the employment thereof to perform duties in aid of the movement and transportation of passengers and property in interstate commerce and the carriage of the mails; (17)

"(b) using, causing, or consenting to the use of any of the funds or monies of said labor organizations in aid of or to promote or encourage the doing of any of the matters or things hereinbefore complained of."(18)

B.—Comparative Analysis of the Debs and Wilkerson Injunctions

Debs Injunction	*Wilkerson Restraining Order*
Sections, 1, 2, 3 and 4:	These sections are covered by the broad and indefinite language of sections (a) and (h). See (1) and (15), *supra*. Section (h) through its terms "in any manner directly or indirectly hindering, etc.," is extremely indefinite.
Section 5:	Not only trespassing upon the property of the railroads to do the prohibited acts is enjoined, but the order under section (c) embraces entering upon property in the vicinity of premises owned by the railroad. See (6), *supra*. So also, assembling in the vicinity of railroad property or at places of ingress and egress to such property for the purposes of picketing is enjoined by section (e). See (10), *supra*. Section (f) further prohibits performing any act of patrolling or picketing at or near railroad property. See (11), *supra*.
Section 6:	The acts enjoined by this section are not specifically referred to in the Wilkerson order. Undoubtedly they would fall within the all-embracing language of section (h). See (15), *supra*.
Section 7: This section is limited to interferences with men's duties while they remain employees. Therefore, there was a provision	Provisions making it unlawful to cause employees to leave their work are scattered throughout the Wilkerson order. A collection of

Debs Injunction	*Wilkerson Restraining Order*
against "persuading" men not to do their duty.	these provisions will illustrate its sweeping extent. Section (a) by its all-inclusive term "in any manner" literally embraces the whole field. See (1), *supra.* Section (b) prohibits *any* interference while the employees are going to and from their work. See (4), *supra.* Section (g) enjoins the causing of "any injury or bodily harm" "in any manner" to any of such employees. See (13), *supra.* This would seem to embrace unintentional as well as intentional injuries, and thereby turn what is ordinarily a tort into criminal contempt.
But in Section 8, dealing with cessation of employment, "persuasion" is significantly omitted as a prohibited method. Inducing employees to leave their employment is prohibited only when such inducing is by "threats, intimidation, force or violence."	Provisions dealing with this subject matter are similarly scattered throughout the Wilkerson order. Section (a) again embraces the whole field with the use of such terms as "in any manner" and "any person." See (2), *supra.* Section (d) specifically enumerates certain prohibited means of accomplishing this end. To those contained in the Debs injunction it adds "violent or abusive language, opprobrious epithets, display of numbers or force, jeers, entreaties, argument, persuasion, rewards" and, for good measure, concludes "or otherwise." See (9), *supra.* Section (i) is the most comprehensive section. In short it makes unlawful such "persuasion" by any spoken or written word. See (16), *supra.* Section 2-(a) aims at certain named officials of the la-

Debs Injunction	*Wilkerson Restraining Order*
	bor unions. They are prohibited from even suggesting the term "abandonment" to any person, whether or not he be an employee of the railroad; nor can they advise persons who have left the employment of the railroad to their future action. See (17), *supra.*
Section 9: Preventing persons from entering the service of the railroads is prohibited only when the means employed are "threats, intimidation, force or violence."	Again the provisions dealing with this topic are scattered throughout the whole of the Wilkerson order. Section (a) again attempts to cover the whole possible field by the use of the term "in any manner." See (2), *supra.* Section (b) in enumerating the prohibited means, adds to the Debs injunction "displays of force or numbers, opprobrious epithets, jeers, suggestions of danger, taunts, entreaties" and concludes "or other unlawful acts or conduct." See (5), *supra.* Section (d) repeats the provisions of section (b) making them applicable to the acts of single individuals as well as of combinations. See (9), *supra.* Section (i) covers the whole field of peaceful persuasion by prohibiting the inducing of such acts by any written or spoken word. See (16), *supra.* Section 2-(a) prohibits the named union officials from suggesting or encouraging persons to refrain from entering the service of the railroads. See (17), *supra.*
Section 10:	Section (b) makes criminal not only the overt act done in furtherance of a conspiracy but also any

Debs Injunction	*Wilkerson Restraining Order*
	concerted agreement. See (3), *supra*.
Section 11:	Provisions of this nature are scattered throughout the Wilkerson injunction and appended to the specific provisions of the other sections. See (12), (13), (14), *supra*. A general catch-all provision is embodied in section (c). See (7), *supra*.

APPENDIX V

JUDGE HOUGH'S INJUNCTION AGAINST UNITED MINE WORKERS

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Clarkson Coal Mining Company, *et al.,*
Plaintiffs
vs.
United Mine Workers of America, *et al.,*
Defendants.

PRELIMINARY INJUNCTION

This cause came on to be heard upon the applications of the plaintiffs and of the intervenor, The New Pocock Coal Company, for a preliminary injunction, and was heard upon the bill of complaint and the intervening bill of complaint and the evidence and was argued by counsel; upon consideration whereof the Court finds:

That all the defendants herein, save John L. Lewis, Philip Murray and Thomas Kennedy as individuals, have either been served with process or have entered their appearance herein, and the Court further finds that plaintiffs and intervenor are entitled to a preliminary injunction as prayed for, for the reason that it clearly appears from specific acts shown by the verified bill and the evidence that immediate and irreparable loss or damage to property rights will result to plaintiffs and intervenor unless a preliminary injunction is granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that save as to John L. Lewis, Philip Murray and Thomas Kennedy as individuals, but including them as officers and agents of said United Mine Workers of America, the defendants herein and the officers, agents and associates of said defendants or any of them, and all persons in concert or participating with said defendants, and all persons to whom notice of this order shall come, be, and they are, severally and collectively hereby enjoined and restrained as follows:

1. From interfering with, obstructing or preventing in any way or attempting so to do, the carrying on of the business of the plaintiffs or any of them and of said intervenor, and from interfering with, obstructing or preventing or attempting so to do, the operation of each and all coal mines of the plaintiffs and the intervenor within the State of Ohio, including specifically the operation by the Clarkson Coal Mining Company of its three coal mines located respectively at or near St. Clairsville and Fairpoint, in Belmont County, and at Dun Glen, in Belmont and Jefferson Counties; the operation by the Monroe Coal Company of the mine known as the Webb Mine, situated near Shadyside, in Belmont County; the operation by the Boomer Coal & Coke Company of the Rose Mine, situated near Cadiz, in Harrison County; the operation by the Atlantic Contracting Company of the Florence Mine, situated near Martins Ferry, in Belmont County; and the operation by The New Pocock Coal Company of its Maple Leaf Mine, situated near the Village of Newport, Tuscarawas County, Ohio, its Cambridge No. 1 Mine, situated at or near the Village of Blue Bell, Guernsey County, Ohio, its Pocock No. 8 Mine, situated at or near the Village of Navarre, Stark County, Ohio, and its Belmont Mine, situated at or near the Village of Flushing, Belmont County, Ohio;

2. From destroying or damaging or attempting to destroy or damage the plant, buildings, equipment or property at or near any of said mines;

3. From exploding or causing to be exploded any dynamite or other explosives anywhere on or about or in the neighborhood of any of said mines or on or near any highway used by employees of any of the plaintiffs or said intervenor, or others going to or from any of said mines, and from shooting at or toward any houses or buildings or structures at or in the vicinity of said mines, or at or toward any of the plaintiffs' agents, officers or employees, or at or toward any person having any contract with any of the plaintiffs or with said intervenor or employees of any such contractor;

4. From trespassing upon or unlawfully entering into or upon any of said mines or any of the lands or buildings owned, leased, or controlled by any of the plaintiffs or said intervenor, and from entering upon or trespassing upon any lands near, or in the vicinity of any of said mines, or the doing of anything designed or intended to interfere in any way with plaintiffs or intervenor or any of them, or the plaintiffs' or intervenor's employees, or with persons having business with any of them;

5. From doing any act or acts of violence, or making any threats by acts or words to, or in the hearing or presence of the employees, or those desirous of or to become employees of any of the plaintiffs or of intervenor, or to or in the hearing of or presence of contractors or employees of contractors with whom plaintiffs or intervenor, or any of them, have contracts, to the effect that such persons or members of their families will be, or may be assaulted, killed, or injured in any manner or that their property will be injured or destroyed;

6. From displaying any signs or banners containing any words or language designed to intimidate or insult employees or prospective employees of plaintiffs or intervenor, who are at said mines or are desirous to go to said mines, or any of them, or contractors or persons having business at said mines, on the premises of the plaintiffs or said intervenor, or on any highway or railroad station within a radius of ten (10) miles from any of said mines. The prohibition applies to the display of signs now or hereafter on property owned or leased by the defendants, as well as to all other places within the territory described. The words "scab," "rat," "yellow dog," and like terms, and profane or obscene words or terms shall not be used in a menacing, threatening, or insulting manner, or be applied to plaintiffs' or intervenor's officers, agents, or employees;

7. From interfering in any way with the plaintiffs and intervenor or any of them or their agents in the making or carrying out of any contract of employment which any of them may desire to make, or has made, with any person; and from attempting to coerce or induce any such employee to break any such contract of employment, and from attempting to coerce or induce any such employee to become a party to any plan or conspiracy of any nature designed or tending to force plaintiffs or intervenor or any of them to enter into a contract with the United Mine Workers of America or any constituent union, or to force the plaintiffs and intervenor or any of them to operate their said mines or any of them upon the "closed union shop basis" against their will.

No groups or crowds shall be permitted for the purpose of communicating with or persuading persons seeking employment from accepting employment or contracting for employment with the plaintiffs and intervenor or any of them. Persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited.

8. From blockading any of the public highways leading to said mines of the plaintiffs or intervenor or any of them, and from interfering in any way with the free use of said highways by any and all persons having business with plaintiffs and intervenor or any of them;

9. From gathering or loitering in groups or crowds about or near the mines or property owned or leased by any plaintiff, or by intervenor, or upon, along or about any public road, railroad, railroad station, or train, or place of any kind near any of said mines or property, or used by plaintiffs' or intervenor's agents or employees, or by persons seeking or having employment contracts with any plaintiff or with intervenor, or used by such contractors, agents or employees in going to and from work wherever located, or used by plaintiffs or intervenor or any of them for the transportation of men under contract who work for them or any of them, for the actual or apparent purpose of intimidating or creating fear in the minds of any such person or persons, or for the purpose of coercing or persuading or attempting to coerce or persuade any person to break or not to make any employment contract with any plaintiff or with intervenor, or from working with any contractor or plaintiff or intervenor.

Nothing contained in this section shall be construed to prevent defendants from meeting in ordinary neighborhood or social gatherings or from attending meetings of their unions in their union halls, provided that such gatherings or meetings shall not be conducted with the purpose or effect of violating the provisions or the spirit of this injunction, and the respective officers of such defendant unions as well as the persons taking part in such gatherings or meetings are charged with the responsibility of carrying this provision completely into effect.

10. From picketing except as herein specifically permitted:

(a) Picket posts may be maintained upon or immediately adjacent to each public highway leading to the mines of plaintiffs or intervenor, but not upon their property, and such posts in no event shall be closer together than Seven Hundred yards (700), nor shall any picket post be located closer than One Hundred feet (100) from any building or structure owned or leased by plaintiffs or intervenor.

(b) Not more than three persons at a time shall be stationed at any picket post, and no other person shall be permitted to stand or loiter at any place within One Hundred feet (100) from the limits of any picket post for any purpose whatsoever.

(c) Each picket post established shall be not to exceed One Hundred feet (100) in length along the highway, and its limits shall be indicated by a sign, flag, or marker.

(d) A list containing the names of the picket details as soon as chosen, will be delivered to the United States Marshal, Southern District of Ohio, accompanied by a rough plat or plats showing the designation and location of each picket post. The list shall also show the assignment and post location of each individual picket. In case of change of picket personnel or location of picket posts at any time, the fact of such change will be reported to said United States Marshal at the time made. The President of Sub-district No. 5 is charged with the duty and responsibility of seeing that the information and reports herein mentioned, are promptly given to the United States Marshal.

(e) Each picket shall be a citizen of the United States, and shall be able to speak the English language.

(f) Relief pickets shall not stay in the vicinity of picket posts when not on duty.

(g) Pickets on duty at their respective posts may peacefully observe, communicate with, and persuade persons, but shall not make use of abusive or threatening language. The peaceful persuasion herein referred to is peaceful persuasion directed towards one who is not known to be an employe, in the effort to keep him from becoming an employe, or directed toward one who is an employe, in the effort to induce him to terminate his relation of employment upon the expiration of any employment contract he may be under, but does not include peacefully persuading one to break an existing employment contract.

(h) The erection or maintenance of tents or other places for the assembly of persons belonging to defendants' unions or their sympathizers (other than tents used solely for pickets) within One Hundred yards (100) of plaintiffs' properties, or within One Hundred yards (100) of any picketed highway, is hereby restrained.

11. From the doing of any act or acts whatsoever in the furtherance of any combination or conspiracy heretofore or hereafter formed for the purpose of hindering, delaying, or interfering with plaintiff or intervenor or any of them in the mining, shipping and sale of coal from said mines or any of them.

12. It is further ordered that the Marshal cause this Preliminary Injunction to be published in a newspaper of general circulation in each of the following counties of Ohio, to-wit: Belmont, Harrison, Jefferson, Tuscarawas, Stark and Guernsey, for at least one issue, and that he cause this Order, together with a Certificate of Authenticity of the Clerk of this Court to be printed in the English, Italian and Polish languages, and to be posted in at least twenty-five conspicuous places in each of said counties, save Stark and Tuscarawas, adjacent to the aforesaid mines and elsewhere, and that the Clerk of this Court issue to the Marshal of the Northern District of Ohio Fifty (50) of said

printed and certified Orders to be by him posted in conspicuous places in the counties of Stark and Tuscarawas adjacent to the said mines of intervenor, and elsewhere; and all persons are forbidden under the penalty of contempt of this Court from destroying, defacing, or mutilating any such poster wherever the same is being lawfully displayed.

13. The Marshal for the Southern District of Ohio is directed to see that this Injunction is enforced within the limits of said district, and to arrest and cause to be arrested any person or persons caught in the act of disobeying any of the provisions of this Injunction, and to bring such person or persons forthwith before the United States Commissioner or the Court, and to report to the Court each such other acts of disobedience of this Order as may otherwise come to his attention. The Marshal is authorized and directed to call to his assistance such persons, either as Deputy Marshals or otherwise, with compensation allowed by law, as he may deem necessary and is empowered by law to do, for the purpose of securing early and prompt obedience to the provisions hereof within his jurisdiction, and for that purpose the Marshal with such assistants as he shall deem necessary and so appoint, shall attend the premises of plaintiffs and intervenor within his jurisdiction, from time to time, and especially at such times as plaintiffs or intervenor shall be ready to engage in mining operations in said respective mines; and said Marshal is authorized to make service of copies of this Order upon any and all persons within his jurisdiction who may be in or about said mines, or in the vicinity thereof, whether or not named as defendants herein.

14. The Court reserves the right to modify this Preliminary Injunction at any time on its own motion and without hearing if the Court shall deem it necessary so to do to make the same more effective and to bring about the purpose for which the same is now issued.

15. This injunction shall become effective as to the plaintiffs upon their giving bond conditioned according to law in the sum of Forty Thousand Dollars ($40,000.00), and it shall become effective as to the intervenor upon its giving a like bond in the sum of Fifteen Thousand Dollars ($15,000.00).

Benson W. Hough,
Judge.

Dated at Steubenville, Ohio, this 10th day of September, 1927.
Effective September 12, 1927, 9 a. m. Eastern Standard Time.

Benson W. Hough,
Judge.

APPENDIX VI

LABOR INJUNCTION IN NEW YORK CASE

Interborough Rapid Transit Co.
vs.
Lavin

Defendant unions and individual defendants, as individuals and as officers of said unions, "and each of their agents, servants, attorneys, confederates, and any other persons acting in aid of or in concert with them" were enjoined:

1. From advising, enticing, inducing or persuading the employees of the plaintiff or any of them to absent themselves from their places of duty, or to abandon or quit the service of the plaintiff, or to strike.

2. From advising, enticing, inducing or persuading the said employees or any of them to become members of any union or association of railroad employees other than the said Brotherhood of Interborough Rapid Transit Company Employees or the Voluntary Relief Department of the plaintiff.

3. From advising, enticing, inducing or persuading the employees of the plaintiff or any of them to breach their contracts of employment with the plaintiff.

4. From holding or causing to be held meetings of the employees of the plaintiff for the purpose of inducing, persuading or exhorting them to absent themselves from their places of duty or to leave the service of the plaintiff, to join any organization of employees other than said Brotherhood, to make demands upon the plaintiff for increased wages, or otherwise take action in violation of their contracts of employment with the plaintiff.

5. From circulating notices, letters, hand-bills or other written or printed communications among the employees of the plaintiff, or displaying the same in the cars or upon the stations, structures or property of the plaintiff, or in public places, advising or urging said employees to join any union or association of employees other than the said Brotherhood, or to leave the service of the plaintiff, or to strike, or to commit

any other acts in violation of their contracts of employment with the plaintiff.

6. From circulating false and malicious statements, written or oral, among the employees of the plaintiff, concerning their working conditions, or the plaintiff, or its financial condition or its ability to pay increased wages to its employees.

7. From doing any act whatsoever knowingly and wilfully, by way of advice, persuasion, or otherwise, to induce the employees of the plaintiff, present or future, or any of them, to breach their several contracts of employment with the plaintiff, or to leave or abandon the service of the plaintiff without plaintiff's consent, or to strike, or from doing any act knowingly and wilfully reasonably calculated to produce such results, or any of them, or from otherwise interfering with the employees of the plaintiff with the wilful and malicious purpose of hindering them in the performance of their contracts of employment with the plaintiff or impairing the service which the plaintiff is rendering and is under obligation to render to the public.

8. From unlawfully, wilfully and maliciously committing acts with the purpose of producing a strike of the employees of the plaintiff and paralyzing the service to the public.

9. From committing acts calculated or intended to injure, deplete or destroy plaintiff's working organization of skilled and trained employees, or the contracts or business of the plaintiff.

10. From wilfully and maliciously, by the use of threats, intimidation or otherwise, compelling or seeking to compel the employees of the plaintiff, or any of them, to abandon the service of the plaintiff and breach their several contracts of employment for the purpose of causing a strike among the employees of the plaintiff, or compelling or seeking to compel the employees of the plaintiff, or any of them, to become members of any union or association of railroad employees, other than the said Brotherhood of Interborough Rapid Transit Company Employees or the Voluntary Relief Department of the plaintiff.

11. From congregating, picketing or loitering upon or in the neighborhood of the plaintiff's cars, stations, structures or other premises for the purpose of inducing or persuading plaintiff's employees to desist from the performance of their duties and leave the service of the plaintiff, or otherwise interfering with the employees, business, or working organization of the plaintiff.

12. From injuring the tracks, cars, stations, structures, power-houses, tools, machinery, cables, or other equipment or physical property of the plaintiff, or otherwise injuring the plaintiff in its business, property or rights.

13. From combining or conspiring together, or doing any act whatsoever, knowingly and wilfully, in furtherance of the aforesaid purposes, of [or] any of them.[1]

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[1] Temporary Injunction order signed by Judge Delehanty December 30, 1926 (opinion reported New York Law Journal, December 14, 1926), affirmed without opinion by the Appellate Division, 220 App. Div. 830, June 24, 1927, reversed by the Court of Appeals January 10, 1928, 247 N. Y. 65. Text is taken from transcript of record on appeal.

APPENDIX VII

LABOR INJUNCTION IN MASSACHUSETTS CASE

Alden Bros. Co.
vs.
Dunn

The following injunction and report of proceedings thereon are taken from Boston Evening Transcript, April 8, 1927, p. 1:

One of the most drastic court orders ever issued in a labor case in Massachusetts came from Judge Morton of the Superior Court, equity motion session, today when, on motion of William P. Everts and Andrew J. Aldridge, counsel for Alden Bros. Company, milk dealers, and others, he perpetually enjoined all of the 800-odd officers and members of Local 380, Milk Wagon Drivers & Creamery Workers' Union from interfering with the business of the milk companies.

The injunction forbids the union from "obstructing, annoying, intimidating or interfering with any person or persons who now are or hereafter may be in its employ, or desirous of entering the same, or by intimidating, annoying, threatening, hindering or obstructing any person or persons transacting business with the complainant, or desirous of entering into contracts, or other business relations with the complainant, from transacting such business or from entering into such contracts, or other business relations, or by intimidating or inducing any person or persons to abstain from doing business with the complainants or performing contracts which such person or persons may have with the complainant.

"From entering into or carrying out any scheme or design among themselves, or with others, for the purpose of annoying, intimidating, obstructing, hindering or interfering with, in any manner, any person or persons who now are or hereafter may be in the employ of the complainant or desirous of entering the same, or hindering in any manner any person or persons who now are or hereafter may be transacting business with the complainant."

The injunction forbids "picketing the premises of the complainant or causing others to picket the premises; from annoying, following, intimidating or obstructing any person or persons who now are or hereafter may be in the employ of the complainant while engaged in their employment, or while proceeding to or from their place of work, abode, habitation, or employment, and the premises of the complainant."

The union men are prevented from "impeding, obstructing, interfering with, hindering or soliciting the trade or customers of the complainant for the purpose of inducing or persuading them not to patronize, trade or deal with the complainant."

The concluding paragraph of the injunction establishes a precedent in labor litigation here. It recites that the unincorporated society (the union) or association, its officers, servants, agents, members thereof, the respondents herein, pay to the complainant forthwith the sum of $60,647 as damages with interest and costs of court, which will be compiled by James McDermott, clerk of the equity court.

The decree of the court includes the names of all the officers and members of the local.

Frederick W. Mansfield, counsel for the union, strenuously objected to the allowance of the decree in the form it was in, especially regarding the naming of all members of the union. He thought that the court should single out the men who were on strike and who might have had a hand in the damage to the milk companies' property rather than name all members, many of whom were in no way responsible for whatever happened. Judge Morton, however, allowed the decree to stand and the case will now go to the full bench of the Supreme Court on appeal by Mr. Mansfield.[1]

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[1] This decree was affirmed September 13, 1928, by the Supreme Judicial Court Mass. Advance Sheets, 1928, p. 1555, 162 N. E. 773.

APPENDIX VIII

INFLUENCE OF INJUNCTION ON INDUSTRIAL CONFLICT

That the injunction is not as effective as is generally believed is the tenor of the following testimony:

1. John P. Frey, Secretary of the Metal Trades Department of the American Federation of Labor, in telling a Senate Committee of a Connecticut state court injunction granted in 1918, said: "Now, the terms of this restraining order restrained the strikers, the officers of their union, of whom I happened to be one, from in any manner telling anyone that there was a strike or had been. . . . Some of our members were arrested for contempt in this case, and not being a lawyer it struck me that the injunction itself, a court order, was a public document, and if I could not tell anyone that there was a strike or had been one I could at least publish the court order. So posters were printed, merely reproducing the injunction, and it so happened that it had more effect in spreading the information that there was a strike than anything which the strikers might have said." (Senate Hearings on S. 1482 (1928) p. 133).

2. The president of the company that procured the famous Hough injunction (see Appendix V) from an Ohio federal court, testified before the Senate Committee as follows: ". . . on the 17th of October Judge Hough issued a preliminary injunction. . . . The very next day the Bradley mine tipple . . . was dynamited." He continued a catalogue of property destruction by fire and dynamite and of personal injuries for a full page and a half in the record. (*Ibid.* pp. 534-36.)

3. The general counsel of the Wisconsin State Federation of Labor, testified as to the results of a Wisconsin federal injunction: "Then there came this injunction, and the officers of the union and the members of the union were called in. I called them into conference . . . and told them. . . . 'You must obey it, and you will have to take the pickets off the line.' "

"There is only one thing that the able counsel who prepared this injunction overlooked, and that is sympathizers—wives and daughters of members—and so we are able as yet to act through them. . . ."

"Now, with the wives and daughters and sympathizers of the employers [sic] we are maintaining a very effective picket line." (*Ibid.* p. 568.)

4. Mr. John P. Frey, further testifying before the Senate Committee said: "I have troubled you longer than I intended to, but merely because we feel so deeply on this subject, and because we know from our practical experience that if we obey the injunctions which have been issued you would have no trades-union movement, because, to obey those injunctions, would have put us out of existence." (*Ibid.* p. 680.)

5. Mr. Walker D. Hines, in testifying before a Subcommittee of the Senate Judiciary Committee on H. R. 23635, Sixty-second Congress, second Session, and after setting forth the facts as to a strike against the Illinois Central Railroad in November 1911, the consequent tying up of traffic, fear of wrecks and sabotage, etc., was asked by the chairman, ". . . were any of these acts which you have referred to of such a character that an action might have been maintained to enjoin them?" Mr. Hines replied: "Yes; I understand they were. I understand such suits were brought, and the history of those cases illustrates the difficulties in enforcing injunction in cases of this sort, even under the present procedure. . . ." (Senate Hearings on H.R. 23635 (1912), Hearings Before Subcommittees of the Committee on the Judiciary, United States Senate, during the Sixtieth, Sixty-first and Sixty-second Congresses, Compiled for use in Consideration of H.R. 15657, Sixty-third Congress, Second Session (1914), Part 6, Limiting Federal Injunctions (1912), p. 637).

6. Mr. Walter Drew, counsel of the National Erectors' Association, said to the Senate Committee in 1912: "It may have occurred to the Senator to inquire why we did not begin injunction suits, but an injunction against dynamite would have been far less effective than criminal action, if we had the evidence to secure it. We could not very well enjoin any one from using dynamite until we had evidence, and the moment we had evidence, criminal action was the proper course." (*Ibid.* p. 831.)

7. Killits, D. J., in *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. 759, 778 (N. D. Ohio 1917): "A history of this controversy shows that, immediately after the issuing of the court's temporary restraining order, the most flagrant public manifestations of unlawful conduct ceased; that thereafter those things were done which could be done surreptitiously or with a smaller chance of detection. . . ."

8. And see the Report of the Attorney General for 1894, p. xxxiii, for some events after the Debs injunction, *supra* Chapter I, note 71.

9. See the recent evidence collected by Dr. E. E. Witte in *The Labor Injunction—A Red Flag* (1928) 18 AM. LAB. LEG. REV. 315.

The claim that the injunction is effective, is thus supported:

1. Concerning the effect of the injunction against the Journeymen Stone Cutters' Association ordered by the Supreme Court (274 U. S. 37), Mr. Green, President of the American Federation of Labor, stated to the Senate Committee: ". . . all members of the Journeymen's Stone Cutters' Association immediately complied with the order." (Senate Hearing on S. 1482 (1928) p. 48.)

"He went back to work because the organization did not care to run the risk of having its members charged with being in contempt. They had no alternative. They were advised that they had no alternative, by their attorney; that there was not anything else for them to do except work." (*Ibid.* p. 62.)

And Mr. W. G. Merritt, the attorney who procured that injunction, said of a companion injunction that he also procured: "It took an injunction of the Federal Courts to start that building enterprise. It was not started until the injunction was secured, after the building had been at a standstill for a year and a half. . . ." (*Ibid.* p. 308.)

2. Mr. Gompers thus testified before a Subcommittee of the Senate Judiciary Committee on S. 6331, Sixtieth Congress, First Session, May 16, 1908, concerning the effect of the injunction in the case of United States v. Workingmen's Amalgamated Council (54 Fed. 998): "The issuance of the injunction under the Sherman antitrust law broke the strike." (Senate Hearings on H.R. S. 6331 and S. 6440 (1908), Hearings Before Subcommittees of the Committee on the Judiciary, United States Senate, during the Sixtieth, Sixty-first and Sixty-second Congresses, Compiled for use in Consideration of H. R. 15657, Sixty-third Congress, Second Session (1914), Part 3, Amendment of Sherman Antitrust Law (1912), p. 372).

3. Daniel Davenport, general counsel of the American Anti-boycott Association, in testifying before the House Committee (House Hearings, 1912, Injunctions, p. 297): Let me say further that there is nothing harder in this world now than to obtain a conviction of a man for contempt of court for disobeying an injunction. . . . I think that the great utility of injunctions in labor cases lies in the fact that the workingmen in the unions are not solicitous and anxious to do the things that are forbidden by law, and when a court issues an injunction against them they are disposed like all good citizens to respect and obey it."

4. G. F. Monaghan, attorney for the National Founders' Association, in testifying against anti-injunction legislation said: "If the injunction is issued in a timely manner, after having reached that point where strikers have violated the fundamental rights of employer and workmen under the law, it has a marvelously deterrent effect in accomplishing an

abolition of these abuses." (*Ibid.* p. 163.) In testifying before the Senate Committee the same year, Mr. Monaghan said: "I say to you on behalf of the industries of the country, if this bill is passed you place them under the domination and dictation of the radical element of unionism. If we can not secure an injunction . . . if we can not procure an effective restraining order . . . what hope have we for the future?" (Senate Hearings on H.R. 23635 (1912), Hearings Before Subcommittees of the Committee on the Judiciary, United States Senate, during the Sixtieth, Sixty-first and Sixty-second Congresses, Compiled for use in Consideration of H.R. 15657, Sixty-third Congress, Second Session (1914), Part 6, Limiting Federal Injunctions (1912), p. 707).

5. Pitney, J., in stating the facts of the *Hitchman Case* (245 U. S. 229, 245): ". . . through the activities of the organizer Hughes, they succeeded in shutting it [the mine] down, and it remained closed until a restraining order was allowed by the court, immediately after which it resumed non-union."

6. Taft, C. J., in the *Tri-City Case* (257 U. S. at 198): "All disturbances ceased after the restraining orders were served."

APPENDIX IX

Proposed Law Governing Labor Injunctions in Federal Courts

A BILL*

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That chapter 2 of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, be amended by adding thereto the following:~~

~~"Sec. 28. Equity courts shall have jurisdiction to protect property when there is no remedy at law; for the purpose of determining such jurisdiction, nothing shall be held to be property unless it is tangible and transferable, and all laws and parts of laws inconsistent herewith are hereby repealed."~~

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* On December 12, 1927, Senator Shipstead introduced a bill (S. 1482) defining the jurisdiction of the United States courts sitting in equity. This bill was referred to the Senate Committee on the Judiciary. A Sub-committee of this Committee, on May 23, 1928, submitted a bill amending Senator Shipstead's bill as above, by striking out all after the enacting clause, and inserting the part printed in italics.

That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or injunction in a case involving or growing out of a labor dispute, except—

(a) When the procedure followed and the order issued by the court shall conform to the definitions of, and the limitations upon, the jurisdiction and authority of the court, contained in this Act; and

(b) When the issuance of such a restraining order or injunction shall not be contrary to the public policy declared in this Act.

SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor; and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, *to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.*

Sec. 3. No undertaking or promise, such as is described in this section, or any other undertaking or promise contrary to the public policy declared in section 2 of this Act, shall be enforceable or shall afford any basis for the granting of legal or equitable relief by any court of the United States, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby—

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or injunction in cases involving or growing out of any labor dispute to prohibit any person or persons participating and interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating and interested in such labor dispute, any strike or unemployment benefits or insurance or other moneys or things of value;

(d) By all lawful means aiding any person participating and interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or injunction upon the ground that any of the persons participating and interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. No officer or member of any association or organization, and no association or organization participating and interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon *clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof.*

Sec. 7. No court of the United States shall have jurisdiction to issue an injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and except after finding of fact by the court, to the effect—

(a) That unlawful acts have been committed and will be continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief sought greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court *shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days, and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file a bond sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.*

SEC. 7a. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reason-

able effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or arbitration.

Sec. *7b. No restraining order or temporary injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such order or injunction.*

Sec. *7c. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, forthwith certify the entire record of the case, including a transcript of the evidence taken, to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.*

Sec. *8. In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Pro-*

vided, That this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 9. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute if the case involves persons who are engaged in the same industry, trade, craft, or occupation; or who are employees of the same employer; or who are members of the same organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees.

(b) A person or association shall be held to be a person participating and interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute

occurs, or is a member, officer, or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress.

SEC. 10. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

SEC. 11. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Amend the title so as to read: "A bill to define and limit the jurisdiction of the courts of the United States, and for other purposes."

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